




A-580-868

AR: 8/03/2012-1/31/2014

Public Document
AD/CVDOpsII: RK

DATE: September 8, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Antidumping Duty Administrative Review of Large Residential
Washers from the Republic of Korea

SUMMARY

We analyzed the case and rebuttal briefs of interested parties in the 2012-2014 administrative review of the antidumping duty (AD) order on large residential washers (LRWs) from the Republic of Korea (Korea). The review covers three producers/exporters of the subject merchandise: Daewoo Electronics Corporation (Daewoo), LG Electronics, Inc. (LGE), and Samsung Electronics Co., Ltd. (Samsung). As a result of our analysis, we made changes to LGE's margin calculation. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of the issues for which we received comments and rebuttal comments from the interested parties:

1. Exclusion of Sales of Merchandise Entered Prior to Date of Suspension
2. Whether Defective Merchandise is Outside of the Scope
3. Exclusion of Re-sales of Defective Merchandise
4. Exclusion of Potentially Double-Counted U.S. Sales
5. Methodological Issues in the Differential Pricing Analysis
6. Zeroing
7. Monthly Time Periods in Differential Pricing Analysis
8. Conducting the Sales-Below-Cost Test Based on Level of Trade



BACKGROUND

On March 9, 2015, the Department of Commerce (the Department) published in the Federal Register the preliminary results of the 2012-2014 administrative review of the AD order on LRWs from Korea.¹ The period of review (POR) is August 3, 2012, through January 31, 2014.

We invited parties to comment on the Preliminary Results. In April 2015, we received timely case and rebuttal briefs from Whirlpool Corporation (the petitioner) and LGE.² At the request of Whirlpool, the Department held a public hearing on May 27, 2015. On June 11, 2015, the Department postponed the final results by 60 days.³ Based on our analysis of the comments received, we recalculated the weighted-average dumping margin for LGE from the Preliminary Results.

MARGIN CALCULATIONS

We calculated export price (EP), constructed export price (CEP), and normal value (NV) for LGE using the same methodology stated in the Preliminary Determination, except as follows:

- We excluded from our margin calculation those U.S. sales of LRWs with reported entry dates prior to August 3, 2012, the date on which suspension of liquidation began, and for which LGE reported that it could trace the actual entry date. See Comment 1 below.

SCOPE OF THE ORDER

The products covered by the order are all large residential washers and certain subassemblies thereof from Korea. The term “large residential washers” denotes all automatic clothes washing machines, regardless of the orientation of the rotational axis, except as noted below, with a cabinet width (measured from its widest point) of at least 24.5 inches (62.23 cm) and no more than 32.0 inches (81.28 cm).

Also covered are certain subassemblies used in large residential washers, namely: (1) all assembled cabinets designed for use in large residential washers which incorporate, at a minimum: (a) at least three of the six cabinet surfaces; and (b) a bracket; (2) all assembled tubs⁴ designed for use in large residential washers which incorporate, at a minimum: (a) a tub; and (b) a seal; (3) all assembled baskets⁵ designed for use in large residential washers which incorporate,

¹ See Large Residential Washers From the Republic of Korea: Preliminary Results of the Antidumping Duty Administrative Review; 2012–2014, 80 FR 12456 (March 9, 2015) (Preliminary Results).

² See Whirlpool Corporation Case Brief, dated April 8, 2015 (Petitioner Case Brief); Whirlpool Corporation Rebuttal Brief, dated April 20, 2015 (Petitioner Rebuttal Brief); LGE Case Brief, dated April 8, 2015 (LGE Case Brief); LGE Rebuttal Brief, dated April 17, 2015 (LGE Rebuttal Brief).

³ See the June 11, 2015, memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through Melissa Skinner, Director, Office II, from Ross Belliveau, International Trade Compliance Analyst, Office II, entitled, “Large Residential Washers from Mexico: Extension of Deadline for Final Results of Antidumping Duty Administrative Review.”

⁴ A “tub” is the part of the washer designed to hold water.

⁵ A “basket” (sometimes referred to as a “drum”) is the part of the washer designed to hold clothing or other fabrics.

at a minimum: (a) a side wrapper;⁶ (b) a base; and (c) a drive hub;⁷ and (4) any combination of the foregoing subassemblies.

Excluded from the scope are stacked washer-dryers and commercial washers. The term “stacked washer-dryers” denotes distinct washing and drying machines that are built on a unitary frame and share a common console that controls both the washer and the dryer. The term “commercial washer” denotes an automatic clothes washing machine designed for the “pay per use” market meeting either of the following two definitions:

(1) (a) it contains payment system electronics;⁸ (b) it is configured with an externally mounted steel frame at least six inches high that is designed to house a coin/token operated payment system (whether or not the actual coin/token operated payment system is installed at the time of importation); (c) it contains a push button user interface with a maximum of six manually selectable wash cycle settings, with no ability of the end user to otherwise modify water temperature, water level, or spin speed for a selected wash cycle setting; and (d) the console containing the user interface is made of steel and is assembled with security fasteners;⁹ or

(2) (a) it contains payment system electronics; (b) the payment system electronics are enabled (whether or not the payment acceptance device has been installed at the time of importation) such that, in normal operation,¹⁰ the unit cannot begin a wash cycle without first receiving a signal from a bona fide payment acceptance device such as an electronic credit card reader; (c) it contains a push button user interface with a maximum of six manually selectable wash cycle settings, with no ability of the end user to otherwise modify water temperature, water level, or spin speed for a selected wash cycle setting; and (d) the console containing the user interface is made of steel and is assembled with security fasteners.

Also excluded from the scope are automatic clothes washing machines with a vertical rotational axis and a rated capacity of less than 3.70 cubic feet, as certified to the U.S. Department of Energy pursuant to 10 CFR § 429.12 and 10 CFR § 429.20, and in accordance with the test procedures established in 10 CFR Part 430.

The products subject to this order are currently classifiable under subheadings 8450.20.0040 and 8450.20.0080 of the Harmonized Tariff System of the United States (HTSUS).¹¹ Products

⁶ A “side wrapper” is the cylindrical part of the basket that actually holds the clothing or other fabrics.

⁷ A “drive hub” is the hub at the center of the base that bears the load from the motor.

⁸ “Payment system electronics” denotes a circuit board designed to receive signals from a payment acceptance device and to display payment amount, selected settings, and cycle status. Such electronics also capture cycles and payment history and provide for transmission to a reader.

⁹ A “security fastener” is a screw with a non-standard head that requires a non-standard driver. Examples include those with a pin in the center of the head as a “center pin reject” feature to prevent standard Allen wrenches or Torx drivers from working.

¹⁰ “Normal operation” refers to the operating mode(s) available to end users (i.e., not a mode designed for testing or repair by a technician).

¹¹ The HTSUS numbers are revised from the numbers previously stated in the scope. See Memorandum to the file

subject to this order may also enter under HTSUS subheadings 8450.11.0040, 8450.11.0080, 8450.90.2000, and 8450.90.6000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this scope is dispositive.

DISCUSSION OF THE ISSUES

Comment 1: Exclusion of Sales of Merchandise Entered Prior to Date of Suspension

LGE argues that the Department should exclude from the margin calculation those U.S. sales for which the subject merchandise entered the United States prior to the start of this specific review period, i.e., August 3, 2012, and the date on which suspension of liquidation began. LGE points to the statute¹² and regulatory practice¹³ to support its contention that the Department may remove those U.S. sales made during the POR that can be tied to import entries with dates prior to the POR.

LGE states that it has reported the entry dates for nearly all of its U.S. sales of complete washers. According to LGE, because subject merchandise that entered the United States prior to the suspension of liquidation is not subject merchandise,¹⁴ the Department should remove those reported sales that can be linked to entry dates prior to the beginning of the POR from its calculation.

The petitioner states that it is the Department's established practice in an administrative review to include in the margin calculation all sales made during the POR, regardless of entry date.¹⁵

entitled "Changes to the HTS Numbers to the ACE Case Reference Files for the Antidumping Duty Orders," dated January 6, 2015.

¹² Section 751(a)(2)(A) of the Tariff Act of 1930, as amended (the Act), which states that the Department shall determine (i) the NV and EP (or CEP) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry.

¹³ See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27314 (May 19, 1997) (Preamble) ("{T}he Department generally will assess duties on entries made during the review period and will use assessment rates to effect those assessments... Where a respondent can tie its entries to its sales, we potentially can trace each entry of subject merchandise made during a review period to the particular sale or sales of that same merchandise to unaffiliated customers, and we conduct the review on that basis"). See also Certain Stainless Wire Rods From France: Final Results of Antidumping Administrative Review, 61 FR 47874, 47875 (September 11, 1996) (Wire Rod from France) ("Sales of merchandise that can be demonstrably linked with entries prior to the suspension of liquidation are not subject merchandise and therefore are not subject to review by the Department... {T}he Department has a well-established exception to its practice of examining CEP sales during the period of review. That exception applies when a respondent is able to demonstrate, to the satisfaction of the Department, that the merchandise covered by a particular sale entered prior to the suspension of liquidation pursuant to the Department's preliminary determination in the LTFV investigation").

¹⁴ See Seamless Refined Copper Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2010-2011, 77 FR 73422 (December 10, 2012) (Copper Pipe from Mexico), and accompanying Issues and Decision Memorandum at page 8 ("In this case, Nacobre demonstrated that certain U.S. sales were linked with entries prior to the suspension of liquidation... Therefore, in accordance with the Department's practice, we have excluded from our analysis Nacobre's U.S. sales which entered prior to the suspension of liquidation because they are not subject merchandise within the meaning of section 771(25) of the Act.") (unchanged in Seamless Refined Copper Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 35244 (June 12, 2013)).

¹⁵ See Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty

According to the petitioner, the Department will depart from that methodology only when it is satisfied that the respondent has linked all CEP sales with entry dates, which LGE has not done.¹⁶ To do as LGE wants, the petitioner continues, would result in a “hybrid” CEP sales database, where the universe of sales examined would mix those included on the basis of entry date and those included on the basis of sale date.¹⁷ Accordingly, the petitioner contends that, consistent with the Department’s practice as confirmed by the Court of International Trade (CIT), all CEP sales must be linked to specific entries before the Department accepts a U.S. sales database defined by POR entry dates.

The Department’s Position:

The situation at hand is a phenomenon of the first administrative review of an AD order, where a respondent may have sold merchandise during the POR to an unaffiliated party after importation, but that merchandise entered the United States prior to the imposition of ADs. Such merchandise is not subject to those duties and should be excluded from the margin calculation. Accordingly, for the final results in this review, consistent with the Preamble at 62 FR 27314, and our practice in such cases as Copper Pipe from Mexico and Wire Rod from France, we excluded from LGE’s final results margin calculation merchandise that LGE reported with an actual date of entry prior to August 3, 2012, the effective date of suspension of liquidation.

LGE reported at pages C-41 – C-42 of its June 2, 2014, response to section C of the Department’s questionnaire (QRC) that it was able to report the actual entry date for its U.S. sales of subject merchandise made from its affiliate’s warehouses in the United States (Channel 1 sales), U.S. sales of subject merchandise shipped directly from Korea to its CEP customers (Channel 3 sales), and U.S sales of defective merchandise (Channel 5 sales). Because LGE is able to match sales through these channels to the actual entry date of the merchandise, we excluded from our analysis those sales through these channels with entry dates prior to August 3, 2012.

However, LGE also stated in the QRC that it was unable to link actual entry dates to its sales through one customer’s warehouse (Channel 2 sales), for which it reported estimated entry dates using a first-in first-out matching principle. The estimated entry dates do not provide a sufficient basis to link the sales of that merchandise with entries prior to suspension of liquidation. Therefore, we did not exclude any Channel 2 sales with reported entry dates prior to August 3, 2012. In addition, LGE did not report entry dates for its EP sales (Channel 4 sales) and, therefore, no EP sales were excluded from our margin calculation.

Furthermore, we note that LGE is not arguing that the Department should use the reported entry dates of its CEP sales to determine the universe of LGE’s transactions to be examined in an administrative review, which the petitioner seems to suggest. Rather, LGE requested that the

Administrative Review and Rescission in Part of Administrative Review, 71 FR 30656 (May 30, 2006) (Hot-Rolled Carbon Steel from Romania), and accompanying Issues and Decision Memorandum at Comment 9.

¹⁶ See Petitioner Rebuttal Brief at page 7 (citing LGE Case Brief at page 9, and LGE December 5, 2014, submission at page 6, acknowledging that LGE could not tie all of its U.S. sales to their specific entry dates).

¹⁷ See Petitioner Case Brief at pages 9-10 (citing Hynix Semiconductor, Inc. v. United States, 248 F. Supp. 2d 1297, 1304 (CIT 2003)(Hynix)).

Department exclude sales from the universe of transactions which entered before the imposition of ADs. We find no basis to support the petitioner's "all or nothing" interpretation regarding the reporting of CEP sales entry dates in the first administrative review. Contrary to the petitioner's assertion, the criteria in Hot-Rolled Carbon Steel from Romania is not applicable to this review because that case did not involve the first administrative review of the order and, therefore, ADs were imposed on the entries for which exclusion was requested.¹⁸ Moreover, contrary to the petitioner's contention, in Copper Pipe from Mexico, the Department did not require that the respondent link all sales to entries prior to the POR but rather excluded "certain U.S. sales {that} were linked with entries prior to the suspension of liquidation."¹⁹ Nothing in the statute, regulations, or the Hynix decision cited by the petitioner²⁰ requires that a respondent report the actual entry dates for all of its CEP sales before the Department may determine whether entry dates may be used to determine whether any of those sales should be included in the POR or, more specifically with respect to the instant review, whether the entry date of the merchandise may be used to determine if the merchandise was subject to the AD order.

Comment 2: Whether Defective Merchandise is Outside of the Scope

LGE contends that its U.S. sales of "defective merchandise" (i.e., merchandise identified and reported in a separate database as "defective returns" and "scrap") are outside the scope of the order and therefore should be excluded from the margin calculation. According to LGE, the scope specifically applies to large residential washers (emphasis added), and scope merchandise must be suitable for residential use, while the defective merchandise sales consist of defective, non-functioning machines which cannot be sold as-is for residential use.²¹ LGE explains that it sells these products to unaffiliated liquidators who either scrap the unit or undertake significant repair, reconditioning, and refurbishing before eventual re-sale for residential use.

Additionally, LGE states that its defective merchandise is outside the scope of the order, as they fail to satisfy five of the six criteria (also known as the Diversified Products criteria) outlined under 19 CFR 351.225(k)(2), and set forth for determining whether merchandise falls within the scope of the order.²² In particular, LGE notes that the expectations of the ultimate purchaser of the defective merchandise are different from those of LGE's customers with respect to non-defective merchandise, as the latter expect the purchased unit to function as a residential washer, while the former has no such expectation and must recondition the unit before it can be re-sold (if at all) as a refurbished unit. LGE also states that the channels of trade for defective

¹⁸ See Hot-Rolled Carbon Steel from Romania, 71 FR 30656, and accompanying Issues and Decision Memorandum at Comment 9.

¹⁹ See Copper Pipe from Mexico, and accompanying Issues and Decision Memorandum at 8.

²⁰ The CIT in Hynix supported the Department's use of POR sales to calculate the margin in the litigated review, but did not indicate a requirement that all CEP sales must be linked to specific entries in order for the Department to depart in any way from a POR-sales-based approach. Moreover, unlike the instant review, in Hynix, the respondent was seeking to include post period or review sales in the administrative review. Hynix, 248 F. Supp. 2d at 1304.

²¹ See LGE Case Brief at pages 19-20 (citing the ITC Preliminary Report to support its contention that the petitioners did not intend to include imports of defective merchandise in the scope. See Certain Large Residential Washers from Korea and Mexico, USITC Pub. No. 4378 (February 2013), at page 6; see also Large Residential Washers From Mexico and the Republic of Korea: Antidumping Duty Orders, 78 FR 11148 (February 15, 2013) (Order)).

²² See LGE Case Brief at pages 22-34.

merchandise are distinct from non-defective merchandise – LGE’s defective merchandise is sold only to specialized liquidators and not LGE’s normal wholesale, retail, or distributor customers.

The petitioner asserts that the damaged and defective merchandise described by LGE is unambiguously in-scope merchandise because they meet the physical specifications provided in the scope, and there is no specific scope exclusion for damaged or defective washers. Additionally, the petitioner contends that the defective washers at issue overlap substantially with non-defective washers under the Diversified Products scope criteria. For example, the petitioner notes that retailers who purchase an LGE washer expect to be able to sell that washer to an end-user to wash clothes; likewise, liquidators who purchase a defective washer expect to repair and sell that washer to an end-user to wash clothes. The petitioner concludes by stating that the ultimate use of the defective and non-defective washers is the same.²³

The Department’s Position:

We find the language of the scope of this Order is clear and dispositive with respect to the defective products at issue. The written description of the merchandise covered by the scope makes clear that the products covered by the Order are all LRWs and certain subassemblies. While the scope of the Order is subject to limited exclusions, these relate only to size and type of washer. More specifically, there is no explicit exclusion for defective merchandise. In particular, with respect to LGE’s contention that defective merchandise is unsuitable as residential washers, we note that LGE has acknowledged on the record of this review that the unit is capable of functioning as a residential washer (*i.e.*, wash clothes in a household) when sold to the ultimate purchaser (*i.e.*, the liquidator’s customer).²⁴ Furthermore, because the scope language in this regard is unambiguous, it is not necessary to consider the criteria enumerated by 19 CFR 351.225(k)(2) to determine whether defective merchandise is subject to the Order. Because LGE’s defective LRWs meet the physical description of in-scope merchandise, and do not meet the requirements set forth in the limited exclusions described in the scope language, we find that they are within the scope of the Order.

Comment 3: Exclusion of Re-sales of Defective Merchandise

LGE contends that, if the Department maintains that defective merchandise is still within the scope, the sales of defective merchandise must be excluded from the margin calculation because the reported sales of defective merchandise are not the “first sale” after importation under the statute.²⁵ Rather, LGE explains that the “first” sale after importation is LGE’s CEP sale, through its U.S. affiliate LG Electronics USA, Inc. (LGEUS), to the unaffiliated wholesaler or retailer, while the sale of defective merchandise occurs after the return of the defective unit and its subsequent re-sale to a liquidator. Accordingly, LGE concludes that the re-sale is not the first

²³ See Petitioner Rebuttal Brief at pages 14-18.

²⁴ See Transcript of Hearing at pages 40-41, and 43, In the Matter of the Antidumping Duty Large Residential Washers from the Republic of Korea -- (A-580-868) Administrative Review Period of Review 08/03/2012-10/31/2014 (May 27, 2015).

²⁵ See LGE Case Brief at pages 35-38 (citing to section 771(35)(A) of the Act which defines dumping margin as “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise,” and CEP is defined under section 772(b) of the Act as “the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation”).

sale after the date of importation, as defined by the statute, and cannot be used to calculate a margin.

The petitioner argues that LGE's interpretation of the statute conflicts with section 751(a)(2)(A) of the Act, which requires the Department to determine the NV and EP or CEP of each entry and the dumping margin of each entry of the subject merchandise. According to the petitioner, when LGE sells a washer that is eventually returned as defective, that sale is either cancelled, and thus removed from the U.S. sales database, or remains in the database but the washer unit sold is replaced with a different unit, which is not recorded a second time in the database. LGE has represented that the returned, defective unit for which the original sale transaction is cancelled, is then re-sold to the liquidator. As the initial sales transaction is cancelled, this subsequent re-sale constitutes the first sale in the United States to an unaffiliated customer and therefore, the petitioner concludes, must be analyzed pursuant to section 751 of the Act.

The Department's Position:

We agree with the petitioner that LGE's sales of defective merchandise must be included in the margin calculation pursuant to sections 751(a)(2)(A) and 772(b) of the Act. As the petitioner correctly notes, section 751(a)(2)(A) requires the Department to calculate the dumping margin for each entry of the subject merchandise. Pursuant to section 772(b) of the Act, the Department is instructed to determine the margin for CEP sales based on the "price at which the subject merchandise is first sold (or agreed to be sold) in the United States... to a purchaser not affiliated with the producer or exporter." LGE's argument would have merit if LGE were to have demonstrated that the sales reported in its defective sales database are the re-sales of merchandise already reported in the non-defective sales database. However, LGE reported that in certain instances, when a washing machine is returned to LGE's unaffiliated wholesaler or retailer customer due to defects, LGE issues that unaffiliated customer a credit note and cancels the original sale.²⁶ Accordingly, that "original sale" (the "first sale" according to LGE) no longer exists and was not reported to the Department.

With the cancellation of the original sale of the washing machine unit, the only remaining sale transaction of that unit for the Department to analyze, and thereby fulfill the statutory obligation to examine each entry, is the sale of the defective unit LGEUS made to the liquidator customer. This transaction constitutes the first sale after importation to an unaffiliated purchaser in the United States that is on the record of this review. Therefore, we agree with the petitioner that LGE's sales of defective merchandise must be included in the margin calculation, pursuant to sections 751(a)(2)(A) and 772(b) of the Act.

Comment 4: Exclusion of Potentially Double-Counted U.S. Sales

LGE argues that, even if the Department disagrees with the preceding arguments regarding the U.S. sales of defective merchandise, certain re-sales of defective merchandise for which LGE never cancelled the original sale of the unit should be excluded. LGE states that, for sales in this

²⁶ See LGE December 5, 2014, submission at Exhibit 5 "Additional Explanation of Defective Return and Scrap Sales." In other instances, defective merchandise is returned to an LGE U.S. affiliate without involving the original wholesaler or retailer customer. This situation is discussed in Comment 4.

category, the company reported both the original sale in its non-defective “goodset” database, and the subsequent re-sale in the defective sales database. Based on the circumstances of the return of the original sale, LGE identified sales of the defective merchandise that it contends are double-counted in its sales reporting through specific computer fields in its most recent U.S. defective sales database.²⁷ According to LGE, these sales, identified as re-sales of “goodsets,” for which the company did not cancel the corresponding original sale, should be excluded to avoid double-counting a single U.S. entry in the margin calculation.

The petitioner, once again, disputes LGE’s contention that the same sale is being counted twice. According to the petitioner, in those instances where LGE did not cancel the original sale of the unit in the “goodset” database and subsequently resold the defective merchandise to a liquidator, the original sale was completed with LGE’s replacement of a second, non-defective unit to the original customer, which was not reported as a new sale transaction, while the original, defective unit is properly reported in the defective sales database. For this reason, the petitioner insists that two washers entered the United States (*i.e.*, the original, defective unit and the second, replacement unit), two washers were sold (*i.e.*, the original, defective unit, and the second, replacement unit), two transactions occurred (*i.e.*, the original sale of the non-defective unit, and the sale of the defective unit), and two customers received subject merchandise (*i.e.*, the original customer received the non-defective unit, and the liquidator received the defective unit). Accordingly, the petitioner contends that the Department’s margin calculation should include both of these reported transactions.

The Department’s Position:

We disagree with LGE. Similar to our position above in response to Comment 3, LGE’s position would have merit if LGE had matched the sales transactions in question in the defective sales database with the corresponding sales transactions in the non-defective “goodset” sales database. That is, if LGE linked each defective merchandise sales transaction reported in the defective sales database with the original sale of that unit reported in the “goodset” sales database, we would agree that LGE reported two sales of the same unit, and to include both in our margin calculation would be double-counting. LGE, however, did not do so.

As LGE explained in its February 5, 2015, submission, it identified the sales it believes are reported in two databases based on the circumstances under which it acquired the defective merchandise. Defective sales transactions that LGE believes may be double-counted are identified by the “DOUBLE_FLAG” field that LGE added in its December 5, 2014, response. According to LGE, where “LGEAI END-USER” is reported under DOUBLE_FLAG, the defective unit was obtained by LGE’s affiliated aftermarket service company LGE Alabama, Inc. (LGEAI) directly from the consumer (end-user customer) of the washer unit. LGE assumes that, because its wholesaler or retailer customer was not involved in the return and did not receive a credit for the returned unit, the initial sale of that unit is included in the “goodset” database.²⁸

However, LGE’s assumption is not sufficient to demonstrate that the sales of defective units identified as “LGEAI END-USER” are, in fact, reported in the non-defective sales database.

²⁷ See LGE December 5, 2014, and February 5, 2015, submissions.

²⁸ See LGE February 5, 2015, submission at pages 22-23.

Because LGE made no attempt to definitively link these defective sales transactions to specific sales transactions in the goodset database (e.g., via serial numbers or otherwise), we have no evidentiary basis to conclude that LGE reported two sales transactions for the same unit. Absent this linkage, we must conclude, as we did in our position to Comment 3, that the sales reported in the defective sales database constitute the first sale to an unaffiliated party in the United States and, therefore, the sales of the defective merchandise are appropriately included in LGE's margin calculation pursuant to sections 751(a)(2)(A) and 772(b) of the Act.

Comment 5: Methodological Issues in the Differential Pricing Analysis

LGE argues that the differential pricing analysis applied in the Preliminary Results does not meet the criteria under section 777A of the Act for applying the alternative average-to-transaction (A-T) comparison methodology in lieu of the preferred average-to-average (A-A) comparison methodology. According to LGE, the Department must make the following changes to its analysis of differential pricing:

1. Change the Department's differential pricing analysis in a manner consistent with section 777A(d) of the Act. Its interpretation of section 777A(d) of the Act is contrary to the plain meaning of the statute and, thus, fails Chevron prong one, and the Department's interpretation is unlawful under Chevron prong two because the methodology is unreasonable. The discretion to adopt a reasonable methodology does not extend to a methodology with features that ignore the key statutory terms of "differ," "pattern" and "significantly" as stated in section 777A(d) of the Act. The Department fails to appreciate that the term "differ" means more than to simply be "unlike" or "distinct" but must be understood in the context of "targeting." The Statement of Administrative Action, H.R. Doc. 103-316, vol. 1 (1994) (SAA) explicitly links the term "differ" with "targeting dumping" and this concept is ignored in the Department's differential pricing analysis. The differential pricing analysis ignores the statutory term "pattern" which requires that there must be enough prices that differ significantly to represent a "reliable sample" from which to draw conclusions about "targeting." The differential pricing analysis also ignores the statutory term "significantly," which requires an assessment of what is significant in context. If price differences are merely "large," they may not have "meaning" in the targeted dumping context if the price differences do not suggest targeting.²⁹

2. Change the mechanical application of the same Cohen's *d* threshold in every case and determine whether differences are actually "significant" in a particular factual context. LGE claims that the Cohen's *d* test is not an accepted measure of statistical significance, but rather it is a measurement of the size of the difference between two mean values. LGE contends that relying on a "large" Cohen's *d* threshold does not equate with a conclusion that the difference is "significant." To supplement the Cohen's *d* test, LGE asserts that the Department should apply a "t-test" or other statistical test to determine whether the difference between two mean values is statistically significant, and should

²⁹ See LGE Case Brief at pages 45-51.

conclude that differential pricing exists only when the Cohen's *d* test and the significance test report a statistically significant result.³⁰

3. Change the finding of a "pattern" from a random mix of prices that are both high and low, and instead focus on the lower-priced sales that may be "targeted" and truly constitute prices that differ "significantly" rather than randomly different. According to LGE, the Department's methodology, which considers both higher- and lower-priced U.S. sales as contributing to a pattern rather than just lower-priced sales, results in higher-priced sales being treated in the exact same manner as lower-priced sales and possibly finding them to be "targeted" sales. LGE contends that a mix of higher and lower prices suggest a random distribution of prices, rather than a "pattern" of possibly "targeted" sales, which should be identified by focusing on the lower-priced sales. To that end, LGE argues that the Department should modify the Cohen's *d* test to consider only lower-priced sales (i.e., sales with a positive Cohen's *d* coefficient) as possibly indicating a "significant" difference and possibly rising to the level of a meaningful "pattern" that warrants further evaluation.³¹

4. Change the exclusion of the sales being tested from the base comparison group to ensure an unbiased evaluation of whether there is a "pattern" of export prices. According to LGE, the Department's current differential pricing methodology compares a test group against other sales transactions, exclusive of that test-group sales. LGE asserts that this methodology increases the likelihood of finding sales passing the Cohen's *d* test, and adds an inappropriate bias to the test. Instead, LGE contends that a more reasonable methodology would be to compare the test group of sales to the universe of sales, inclusive of the sales in the test group, in order to more appropriately determine whether the prices to a given purchaser, region, or during a particular time period are significantly different from the average prices observed among all sales.³²

5. Change its methodology of separately determining whether prices differ significantly among purchasers, regions, or time periods, and then aggregating the results to determine whether the threshold for applying an alternative comparison methodology has been met. LGE contends that the Department must separately determine for each category whether a pattern of export prices that differs significantly exists. Under the Department's current methodology that aggregates the results, LGE claims that it leads to "double-counting" of the results, and masks the fact that sales are not differentially priced by any of the individual bases analyzed. LGE asserts that the 33- and 66-percent thresholds used in Department's methodology, therefore, must be applied to each category of differential analysis, rather than the aggregate, in order for the Department to make an affirmative determination of a pattern of prices that differ significantly.³³

6. Change its calculation in the ratio test, and instead recognize that a "pattern" must exist in the context of all the U.S. exports sales, not just some of them. LGE maintains

³⁰ *Id.* at pages 51-60.

³¹ *Id.* at pages 60-66.

³² *Id.* at pages 67-73.

³³ *Id.* at pages 73-80.

that the Department's methodology excludes from the denominator in the ratio test U.S. sales which were not tested to determine whether they were at prices which differ significantly. As a result, LGE contends that excluding these sales from the total used in the denominator of the Department's ratio test improperly distorts the results of the ratio test under the statute to determine whether a pattern of prices that differ significantly exists.³⁴

7. Change the current thresholds of the Cohen's *d* coefficient (i.e., 0.8) and the ratio test (33 percent of sales which pass the Cohen's *d* test), which LGE contends are internally inconsistent, to different levels that identify a "pattern" of prices that "differ significantly" in a consistent and reliable manner. LGE explains in detail in its brief that the thresholds used in the Department's approach are inconsistent with proper statistical methods and thus do not properly determine whether a significant difference of prices exist that constitute a pattern.³⁵ To arrive at a more statistically-sound result, LGE posits that the Department should raise the 33 percent threshold to 42 percent or above, or raise the Cohen's *d* test threshold to 0.974 or above.³⁶

Finally, LGE argues that, even if the Department properly finds the existence of a pattern of prices that differ significantly, it must adequately explain why the normal comparison methodology cannot be used, as required under section 777A(d)(1)(B)(ii) of the Act.³⁷ LGE contends that a statement that simply notes a difference in the weighted-average dumping margins calculated using the A-A method and an alternative comparison method does not meet the statutory requirement to explain why "such differences" could not be taken into account by the standard A-A method. Thus, LGE asserts that the Department must sufficiently explain why the A-A method cannot take into account those price differences observed before the Department resorts to an alternate comparison method.

The petitioner counters that the statute neither supports nor requires the changes to the Department's methodology that LGE advocates. According to the petitioner, the Department considered and rejected similar objections to the Cohen's *d* methodology in the past, broadly finding that they have no grounding in the language of the statute. The petitioner continues that the Department's Cohen's *d* test reasonably tests whether high prices and low prices contribute to the pattern of price differences. The petitioner points out that the Cohen's *d* test is a generally-recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group. The petitioner adds that section 777A(d)(1)(B)(i) of the Act does not require the Department to adopt a specific statistical measure or test when determining whether there exists a pattern of prices that differ significantly and, thus, the Department's use of the Cohen's *d* test is well within its discretion.³⁸

With respect to LGE's specific challenges to the Department's methodology, the petitioner asserts that the Department has addressed them previously in such cases as Copper Tube from

³⁴ Id. at pages 80-81.

³⁵ Id. at pages 81-86.

³⁶ Id. at pages 86-87.

³⁷ Id. at pages 88-91.

³⁸ See Petitioner Case Brief at pages 24-35.

Mexico,³⁹ where the Department responded to similar arguments on its statistical analysis by explaining:

...it is unnecessary to consider sampling size, randomness of the sample, or to include a measure of the “statistical significance” of its results, as this analysis includes all data in the “statistical population” of the respondent’s sales in the U.S. market. The Cohen’s *d* test “is a generally-recognized *statistical measure* of the extent of the difference between the mean of a test group and the mean of a comparison group.” Within the Cohen’s *d* test, the Cohen’s *d* coefficient is calculated based on the means and variances of the test group and the comparison group. The test and comparison groups include all of the U.S. sales of comparable merchandise reported by the respondent. As such, the means and variances calculated for these two groups are the actual values for both the test and comparison groups, and are not estimates which include sampling errors.... The Department’s application of the Cohen’s *d* test is based on the mean and variance calculated using the entire population of the respondent’s sales in the U.S. market and, therefore, these values contain no sampling error.⁴⁰

Accordingly, the petitioner asserts that the addition of a t-test to measure statistical significance, as LGE advocates, is unnecessary because the Department is analyzing the entire population of LGE’s U.S sales database, not a subset for which it might need to consider sampling error. With respect to LGE’s argument that the Department’s methodology improperly excludes the test sales from the base sales when comparing the two different groups, the petitioner responds that LGE misunderstands the point of determining effect size, which is measuring the difference between two different groups. According to the petitioner, the inclusion of the test group within the base group would be nonsensical because it would result in the same group being tested against itself.⁴¹

With respect to LGE’s arguments that it is contrary to the statute for the Department to aggregate the results of the differential pricing test for differences in pricing by purchaser, region or time period and that the 33 percent-66 percent threshold should be applied to each group on an individual basis, the petitioner responds that there is no support in the statute for LGE’s approach. The petitioner also disputes LGE’s contentions that the Department’s thresholds are internally inconsistent for what constitutes a “large” difference between the means relative to the pooled standard deviation and the 33 percent threshold for determining whether these large differences amount to a pattern. According to the petitioner, LGE’s representations are mathematically incorrect.⁴²

³⁹ See Seamless Refined Copper Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review; 2011-2012, 79 FR 36719 (June 30, 2014) (Copper Tube from Mexico).

⁴⁰ See Petitioner Rebuttal Brief at pages 29-30 (citing Copper Tube from Mexico, and accompanying Issues and Decision Memorandum at Comment 4; and 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) (Activated Carbon 6), and accompanying Issues and Decision Memorandum at Comment 2.B, as examples of the Department’s defense of its differential pricing methodology). See also Petitioner Rebuttal Brief at pages 31-32.

⁴¹ See Petitioner Rebuttal Brief at pages 31-33.

⁴² Id. at pages 33-35.

The petitioner concludes that the Department's Cohen's *d* test reasonably tests whether high prices and low prices contribute to the pattern of price differences. According to the petitioner, the Department's differential pricing analysis in the Preliminary Results revealed that LGE had significant dumped sales that were masked by the application of the Department's standard A-A comparison methodology. Consistent with the CIT's holding in Apex, the petitioner asserts that the Department properly explained why the A-A methodology masked LGE's dumping.⁴³

The 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-A method or the transaction-to-transaction (T-T) method cannot account for such differences. On the contrary, carrying out the purpose of the statute here is a gap filling exercise properly conducted by the Department.⁴⁴ As explained in the Preliminary Results, the Department's differential pricing analysis is reasonable, including the use of the Cohen's *d* test as a component in this analysis, and that it is in no way contrary to the law.

As stated in section 777A(d)(1)(B) of the Act, the requirements for considering whether to apply the A-T method are that there exists a pattern of prices that differ significantly and that the Department explains why either the A-A method or the T-T method cannot account for such differences. The Department's application of the differential pricing analysis in this 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 normal A-A methodology, and it provides a remedy for masked dumping when the conditions exist.

Purpose and Meaning of Section 777A(d)(1)(B) of the Act

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.--

(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

⁴³ Id. at pages 36-40 (citing Apex Frozen Foods Private Ltd v. United States, 37 F. Supp. 3d 1286 (CIT 2014), (Apex) at 1296 ("Hence, by comparing Apex's non-zeroed A-A rate to its zeroed A-T rate, the agency found the precise amount of dumping-including dumping from targeted sales that A-A masked. Commerce could then decide whether that dumping was great enough to merit an exceptional remedy. This method fulfills the statute's aim and deserves deference...")).

⁴⁴ 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).

(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 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 average-to-average 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.⁴⁵

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

In part the reluctance to use the average-to-average methodology had been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."⁴⁶

With the implementation of the URAA and subsequently the Final Modification for Reviews,⁴⁷ the Department's standard comparison method is normally the A-A method. This is reiterated in the Department's regulations, which state that "the Secretary will use the A-A method unless the Secretary determines another method is appropriate in a particular case."⁴⁸ As recognized by

⁴⁵ See SAA at 843.

⁴⁶ *Id.* at 842.

⁴⁷ 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 ('A-A') comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations").

⁴⁸ See 19 CFR 351.414(c).

LGE in its case brief, the application by the Department of the A-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-T method, as an alternative comparison method, may respond to such concerns "where targeted dumping *may* be occurring."⁴⁹ Neither the statute nor the SAA state that this is the only reason why the Department could resort to the A-T method, simply that this *may* be a situation where the A-T method would be appropriate. As stated in the statute, the requirements for considering whether to apply the A-T method are that there exist a pattern of prices that differ significantly and that the Department explains why either the A-A method or the T-T method cannot account for such differences.

Nonetheless, LGE asserts that the Department must identify "targeted dumping" or "targeting" in order for its analysis to satisfy the statutory requirements. LGE insists that these terms somehow modify the meaning of the words "pattern," "differ" and "significantly" beyond the guidance provided in the SAA. LGE would impose on the Department unspecified criteria which would render it unable to give meaning to the statutory provision. The Department's application of the differential pricing analysis in this proceeding 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 normal A-A methodology, and it provides a remedy for masked dumping when the conditions exist.

The purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-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.⁵⁰ While the SAA states that "targeting" or "targeted dumping" may be occurring with respect to an exporter's U.S. sales, it is neither a requirement nor a pre-condition for the Department to otherwise determine that the A-A method is not appropriate based upon a finding that the two statutory requirements have been satisfied. Furthermore, "targeting" implies an intent on behalf of the exporter. 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.⁵¹ The Court of Appeals for the Federal Circuit (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 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." JBF RAK, 991 F. Supp. 2d at 1355 (internal quotation marks and citation omitted).⁵²

⁴⁹ See SAA at 843 (emphasis added).

⁵⁰ See 19 CFR 351.414(c)(1).

⁵¹ See JBF RAK LLC v. United States, 790 F.3d 1358 (Fed. Cir. 2015) (JBF RAK), *aff'd* again in Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States, 2015 U.S. App. LEXIS 10653 (Fed. Cir. 2015) (Borusan).

⁵² See JBF RAK, 790 F.3d at 1368.

The Department disagrees with LGE that the SAA's reliance on "targeting" and "targeted dumping" infers additional meaning to the words "pattern," "differ" and "significantly" beyond our understanding of these words in the statute. When discussing the meaning of the term "pattern," LGE's arguments are circular and present conclusions that are not logically supported by the evidence on the record. Initially, LGE states that those "significantly different prices *must be frequent enough* and persistent enough to constitute a 'pattern' of such prices."⁵³ This is followed by LGE's statement that "the plain meaning *does not focus mechanically on the mere frequency of instances*, by rather require a 'reliable sample' to draw some conclusion about a 'characteristic' or 'tendency'..."⁵⁴ LGE then circles back to conclude that there must be "*enough instances to reasonably draw a conclusion* about the characteristic at issue in a given situation."⁵⁵ Further, LGE states

The point is *not just to count up the number of prices that differ* in some random manner, but rather *to consider whether there are enough prices that differ significantly* in a certain way so as to represent a "reliable sample" from which to draw possible conclusions about targeting.⁵⁶

LGE's alternates between insisting that frequency first is, and then is not, the basis for examining whether a pattern exists, such that the Department is left without a clear argument to which to respond. The arguments presented only serve to obfuscate the issue and any conclusions that have been drawn by LGE have been undermined by its own previous or subsequent positions taken. Furthermore, LGE relies on the term "reliable sample," the starting point of the dictionary definition upon which LGE bases its argument,⁵⁷ and according to which the term "pattern" should be considered in the context of the frequency or extent of the "traits, acts, tendencies or other observable characteristics"⁵⁸ which are being examined.

In the context of the statute, the Department interprets "pattern" to mean some type of order or arrangement which can be discerned. When looking at an exporter's pricing behavior overall, as when using the A-A method to ascertain the extent of an exporter's dumping, no order may be apparent; however, when this same behavior is arranged by purchasers, regions or time periods, then an order of prices may be apparent, and such an order of prices may exhibit significant differences. When such significant differences in prices exist to a reasonable extent, then the Department will find that a "pattern" has been found to exist.

Furthermore, the statute requires that this arrangement or order of prices, which is apparent when examined by purchaser, region, or time period, must exhibit significant differences. The Department has interpreted this to denote differences that are relative to the variations of prices within each group. As discussed above, one such situation where such a pattern of prices that

⁵³ See LGE Case Brief at 49 (emphasis added).

⁵⁴ *Id.* (emphasis added).

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Id.* at 50 (emphasis added).

⁵⁷ *Id.* (quoting Webster's Ninth New Collegiate Dictionary, LGE states that the "plain meaning of 'pattern' in this context is 'a reliable sample of traits, acts, tendencies, or other observable characteristics of a person, group, or institution.'").

⁵⁸ *Id.*

differ significantly may exist is where “targeted dumping” is occurring. As discussed in the SAA, this is where an exporter is dumping to particular groups while selling at higher prices to other groups in order to hide or mask dumping.⁵⁹

LGE infers that “differ” is modified by the SAA to mean something with respect to “targeting” or “targeted dumping,” but this is not part of either the statute or the SAA, and makes no sense. Such phrases as “differ targeting,” “targeted differ” or even “differ targeted” have no reasonable meaning. The statute properly qualifies the term “differ” by providing the modifier “significantly” – “differ significantly” – giving reasonable meaning to the terms in the provision.

Section 777A(d)(1)(B)(i) of the Act specifies “a pattern of {prices} for comparable merchandise that differ significantly.” The Department disagrees with LGE that the term “differ,” in isolation, means anything other than “unlike,” “distinct” or “not identical.” In mathematical terms, two numbers can differ by one or they can differ by one thousand; they nonetheless still “differ.” Beyond this meaning, the Department does agree with LGE that the term “differ” in the statute is modified by “significant.” From Webster’s dictionary,⁶⁰ as cited by LGE,⁶¹ “significant” has the following meanings:

1. having meaning;
2. a. having or likely to have influence or effect, of a noticeably or measurably large amount;
b. probably caused by something other than mere chance.

Thus, the term “differ significantly” connotes not just being “not identical” but also where it has meaning, where it has or may have influence or effect, where it is noticeably or measurably large, and where it may be beyond something that occurs by chance.

Regarding the consideration of “significant,” LGE states

Moreover, the term “significantly” requires an assessment of what is significant in a particular context. The proper interpretation of the term “significantly” requires an assessment in light of the purposes of targeted dumping in an antidumping context. Something that may be significant in the abstract may well not be significant or have any meaning in this specific context. Thus even if price differences are large, they may not be significant in this context if the price differences do not suggest targeting. Something may also not be “significant” in the context of a particular product or industry. Price differences that may be “significant” in one industry might be completely normal and unremarkable in other industries.⁶²

The Department agrees that the observed differences in prices must be taken in context when discerning whether they are significant. This is done not just on a product or industry level, but on an exporter-specific basis in relation to the pricing behavior exhibited by each individual exporter. Thus, as significant difference is not defined as a difference in the average prices of,

⁵⁹ See SAA at 842.

⁶⁰ See Webster’s Ninth New Collegiate Dictionary (1986), p. 1096.

⁶¹ See LGE’s Case Brief, footnote 86, page 50.

⁶² Id. at 50-51.

for example, two dollars per kilogram, but rather this threshold is established based on the prices for actual sales in the U.S. market as reported by the respondent under examination. Therefore, a price difference which may be significant for one industry, product and exporter, may not be significant for a different industry, product and exporter.

Therefore, in conclusion, a “pattern of prices that differ significantly among purchasers, regions or time periods” means that the Department is examining the extent to which the prices, when ordered by purchaser, region or time period, exhibit differences which have meaning, which have or may have influence or effect, which are noticeably or measurably large, and which may be beyond something that occurs by chance; and whether from the extent of these prices differences one can reasonably make a conclusion about the characteristics of the exporter’s pricing behavior.

As discussed in detail below, the Department has fully recognized the literal words, the contextual meaning, and the historical purpose and congressional intent of the statutory provision concerning the application of the A-T method as an alternative comparison method to the A-A or the T-T method.

The Cohen’s *d* Test Is Consistent With the Meaning of the Statute

The purpose of considering an alternative comparison method is to examine whether the A-A method is appropriate to measure each respondent’s amount of dumping, some of which may be hidden because of masked dumping. Masked dumping is the result of two concurrent situations: dumped sales and non-dumped sales. One without the other does not result in masked dumping. The existence of both dumped and non-dumped sales is necessary to have the potential for masked dumping; therefore, one must consider both low-priced and high-priced sales when determining whether a pattern of prices that differ significantly exists and whether masking is occurring. A pattern can involve prices that are lower than the comparison price or higher than the comparison price. Lower, higher, or both are all possibilities for establishing a pattern consistent with section 777A(d)(1)(B)(i) of the Act.

As stated in the Preliminary Results, the purpose of the Cohen’s *d* test is to evaluate “the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise.”⁶³ The Cohen’s *d* coefficient is a recognized measure which gauges the extent (or “effect size”) of the difference between the means of two groups. In the final determination for Xanthan Gum from the PRC,⁶⁴ the Department stated “{e}ffect 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.” In addressing Deosen’s comment in Xanthan Gum from the PRC, the Department continued:

⁶³ See Preliminary Results, and accompanying Preliminary Decision Memorandum (Preliminary Decision Memo) at page 6.

⁶⁴ See Xanthan Gum From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013) (Xanthan Gum from the PRC), and accompanying Issues and Decision Memorandum at Comment 3.

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 the Cohen's *d* test to satisfy the statutory language, to measure whether a difference is significant.⁶⁵

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

The Department thus relies on the Cohen's *d* coefficient as a measure of effect size to determine whether the observed price differences are significant. In this application, the difference in the weighted-average (*i.e.*, mean) U.S. price to a particular purchaser, region or time period (*i.e.*, the test group) and the weighted-average U.S. price to all other purchasers, regions or time periods (*i.e.*, the comparison group) is measured relative to the variance of the U.S. prices within each of these groups (*i.e.*, all U.S. prices).

The results of such an analysis may have statistical and/or practical significance, and these two distinct measures of significance are independent of one another.⁶⁶ As explained below, statistical significance is not relevant to the Department's examination of an exporter's U.S. prices when examining whether such prices differ significantly. The question is whether there is a practical significance in the differences found to exist in the exporter's U.S. prices among purchasers, regions or time periods. Such practical significance is quantified by the measure of "effect size."

In the Department's application of the Cohen's *d* test in these final results, the Department based its analysis, including the calculation of effect size, on all of the exporter's prices in the U.S. market – *i.e.*, the entire population of LGE's U.S. prices. Accordingly, the measures used to calculate effect size are not estimates but the actual values calculated from the population as a whole, and as such there is no statistical significance associated with the results of the analysis.

Furthermore, even assuming that "significance" could imply "statistical significance," as LGE suggests, we note that, if Congress had intended to require a particular result to ensure the

⁶⁵ *Id.* (emphasis in original).

⁶⁶ See Paul Ellis, *The Essential Guide to Effect Sizes* (2010) (Ellis) at page 3, submitted for the record at Exhibit 9 of LGE's December 5, 2015, submission.

“statistical significance” of price differences that mask dumping as a condition for applying an alternative comparison method, Congress presumably would have used language more precise than “differ significantly.” The Department, tasked with implementing the antidumping law, resolving statutory ambiguities, and filling gaps in the statute, does not agree with LGE that the term “significantly” in the statute can mean only “statistically significant.” The law includes no such directive. The analysis employed by the Department, including the use of the Cohen’s *d* test, fills the statutory gap as to how to determine whether a pattern of prices “differ significantly.” Further, the use of the t-test as well as other statistical measures is to determine from a sample of a larger population an estimate of what the actual values (e.g., the mean or variance) of the larger population may be with a probability or “statistical significance” attached to that estimate.⁶⁷ However, the Department’s use of the Cohen’s *d* test is based on the entire population of U.S. sales by the respondent, and, therefore, there are no estimates involved in the results and accordingly “statistical significance” is not a relevant consideration.

The Department disagrees with LGE’s claim that the Cohen’s *d* test’s thresholds of “small,” “medium,” and “large” are arbitrary. Although these thresholds have qualitative labels, as described in the Preliminary Decision Memo, the Department stated that of these three thresholds, “the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists.”⁶⁸ These thresholds are recognized as “a good basis for interpreting effect size and for resolving disputes about the importance of one’s results.”⁶⁹ In other words, the significance required by the Department in its Cohen’s *d* test affords the greatest meaning to the difference of the means of the prices among purchasers, regions and time periods.

We also disagree with LGE that the Department should not consider both lower-priced and higher-priced sales in the Cohen’s *d* analysis. We note that higher-priced sales are equally capable as lower-priced sales of creating 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 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. The statute neither provides that the Department should consider only higher-priced sales or only lower-priced sales when conducting its analysis, nor specifies whether the difference must be the result of certain sales being priced higher or lower than other sales.

Higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis. 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 the question of whether there is a pattern of prices that differ significantly because this analysis includes no comparisons with NVs. By

⁶⁷ See Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 70533 (November 26, 2013), and accompanying Issues and Decision Memorandum at Comment 4.

⁶⁸ See Preliminary Decision Memo at page 8.

⁶⁹ See Ellis at page 40.

considering all sales, higher-priced sales and lower-priced sales, the Department is able to analyze an exporter's pricing behavior and to identify whether there is a pattern of prices that differ 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 pricing behavior which creates a pattern, there is cause to continue with the analysis to determine whether masked dumping is occurring. Accordingly, both higher- and lower-priced sales are relevant to the Department's analysis of the exporter's pricing behavior.

With respect to LGE's assertion that the sales in each test group should be included in the comparison group rather than be independent of the comparison group, we disagree. This approach would result in sales prices by purchaser, region, or time period being compared to themselves. In LGE's example of two customers accounting for 90 percent and 10 percent of the sales (customer A and customer B, respectively), sales to each customer are only compared to the sales to the other customer (as in the Department's differential pricing analysis) and not to the combined set of sales to both customers.⁷⁰ As a result, if the sales to customer A are found to be at significantly different prices than the sales to customer B, then the sales to customer B will also be found to be at significantly different prices than those to customer A. That is, all of the sales will be at significantly different prices. The Department disagrees with LGE that this approach skews the results and is contrary to the statute. The Department finds it logical that, if A is different from B, then B is different from A.

Ratio Test Denominator

The Department disagrees with LGE's assertion that non-tested U.S. sales have been excluded from the denominator of the ratio test. In the first step of section US-13-E-iii of the Department Margin Program, the Department totals the U.S. net sales value. Two steps later, the Department calculates the proportion of U.S. sales which have passed the Cohen's *d* test, based on net sales value where the denominator is the total U.S. net sales value.⁷¹ Accordingly, LGE's claim is incorrect because the denominator in the ratio test includes the value of all U.S. sales.

The Ratio Test And Patterns By Purchasers, Regions and Time Periods

We disagree with LGE's claim that it is inappropriate to aggregate the results of the individual comparisons within the Cohen's *d* test to determine whether there exists a pattern of prices that differ significantly. As described in the Preliminary Decision Memo, the Cohen's *d* test evaluates whether sales of comparable merchandise to a particular purchaser, region or time period exhibit prices that are significantly different from sales to all other purchasers, regions or time periods, respectively.⁷² As such, this analysis must be done for "comparable merchandise" for each of the three specified categories, the results of which are then aggregated for the producer or exporter as a whole to determine whether there exists a pattern of prices that differ significantly for that producer or exporter. When a particular sale is found to be at a significantly

⁷⁰ See LGE Case Brief at pages 70-72.

⁷¹ See LGE Calculation Memo at Attachment 2 (proprietary version), Margin Program Log, pages 79-80.

⁷² See Preliminary Decision Memo at pages 7-8.

different price by more than a single category (*i.e.*, by purchaser, region or time period), that sale is only counted once when aggregating the value of U.S. sales which have passed the Cohen's *d* test (*i.e.*, the numerator of the ratio test). Neither the statute nor the SAA specifies that this aggregation is limited to, or must be segregated by, each of the three ways which an exporter could structure its pricing behavior, nor is there any reasonable, logical reason to do so. In fact, logic and reason dictate that each of the comparison results within the Cohen's *d* test be aggregated into one overall analysis because if such a pattern is found to exist, then the Department will examine whether the standard A-A method can account for such differences.

The purpose of this analysis is to determine whether the default A-A method is an appropriate tool with which to measure the respondent's amount of dumping should there be an indication of masked dumping manifested by a pattern of export prices that differ significantly among purchasers, regions or time period. The Department undertakes a similar aggregation process when measuring a total amount of dumping. Therefore, the Department continues to find that its use of the Cohen's *d* and ratio tests in these final results is consistent with the statute and is a reasonable interpretation of its mandate to calculate the weighted-average dumping margin for LGE.

Differential Pricing Analysis Thresholds

We disagree with LGE's contention that the thresholds applied in the Department's differential pricing analysis (*i.e.*, the "large" threshold of 0.8 standard deviation for the Cohen's *d* coefficient to identify price differences, and the 33 percent threshold for sales which pass the Cohen's *d* test) are internally inconsistent. As noted above, neither the statute nor the SAA provides any guidance in determining whether the requirements of section 77A(d)(1)(B)(i) and (ii) of the Act are satisfied and, if satisfied, how to apply the A-T method. Accordingly, the Department has reasonably created a framework to determine how the A-T method may be considered as an alternative to the standard A-A method based on the extent of the pattern of prices that differ significantly as identified by the Cohen's *d* test. LGE does not demonstrate that our reliance on the Cohen's *d* test, which is a generally-recognized measure of effect size, is unreasonable and that some higher threshold not enumerated in the statutory language, must be satisfied. Further, as discussed above, in the Preliminary Decision Memo, and in numerous determinations,⁷³ the Cohen's *d* test is a generally-recognized measure of the significance of the differences of two means, and we applied a recognized threshold of "large" to provide the strongest indication that there is a significant difference between the means of the test and comparison groups.

The Department has discussed in numerous instances that our price percentage thresholds are reasonable and consistent with the statute. As noted above, we explained that the use of the "large" threshold (*i.e.*, 0.8 standard deviation) for the Cohen's *d* coefficient to gauge the difference in the means relative to the pooled standard deviation is the strongest indication that there is a significant difference between the means of the test and comparison groups.⁷⁴ When

⁷³ See, e.g., 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) (CWP from Korea), and accompanying Issues and Decision Memorandum at Comment 1.

⁷⁴ See, e.g., CWP from Korea at Comment 2.

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 constitutes the identified pattern of prices that differ significantly from that which does not. Accordingly, the Department determines that considering the application of the A-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 the extent of this pattern not to be significant and does not consider the application of the A-T method as an alternative comparison method to be appropriate. When between 33 percent and 66 percent of the value of a respondent's U.S. sales constitute a pattern of prices that differ significantly, then the Department considers the extent of this pattern not to be significant in applying the A-A method, in part, but also finds that segregating this pricing behavior from the pricing behavior which does not contribute to the pattern to be reasonable, and accordingly considers the application of the A-T method as an alternative comparison method to this limited portion of a respondent's U.S. sales.

Explanation Requirement

We disagree with LGE's assertion that the Department has not provided an adequate explanation why the A-A method cannot account for such differences. As explained in the Preliminary Results, if the difference in the weighted-average dumping margins calculated using the A-A method and an appropriate alternative comparison method is meaningful, then this demonstrates that the A-A method cannot account for price differences and, therefore, an alternative comparison method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if: 1) there is a 25 percent relative change in the weighted-average dumping margin between the A-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.⁷⁵

When the "pattern" requirement under the statute has been satisfied, conditions exist in which dumping may be hidden or masked – i.e., there are prices which differ significantly. For example, considering a simple situation of a difference in two average U.S. prices, the differences in the dumping margins calculated using the A-A method and the A-T method will fall into one of five scenarios:

- 1) the normal value is less than all of the U.S. prices and there is no dumping;
- 2) the normal value is greater than all of the U.S. prices and all sales are dumped;
- 3) the normal value is nominally greater than the U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;
- 4) the normal value is nominally less than the U.S. prices such that there is a significant

⁷⁵ See Preliminary Results, and accompanying Preliminary Decision Memo at pages 5-7. See also, e.g., Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 11160 (March 2, 2015), and the accompanying Issues and Decision Memorandum at Comment 3; and Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 10051 (February 25, 2015) (PET Film Taiwan), and the accompanying Issues and Decision Memorandum at Comment 2.

- amount of dumping and a minimal amount of offsets generated from non-dumped sales;
- 5) the normal value is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant amount of offsets generated from non-dumped sales.

Under scenarios (1) and (2), either there is no dumping or all U.S. sales are dumped such that there is no difference between the A-A method with offsets and the A-T method with zeroing – i.e., there is no meaningful difference as described above and in the Preliminary Decision Memo. Under scenario (3), there is a minimal (i.e., de minimis) amount of dumping, such that the A-A method and the A-T method result in either a zero or de minimis weighted-average dumping margin which does not constitute a meaningful difference. Under scenario (4), there is a significant (i.e., non-de minimis) amount of dumping with only a minimal amount of non-dumped sales, such that there is not a meaningful difference in the weighted-average dumping margins (i.e., less than a 25 percent relative change or no change from de minimis to non-de minimis) calculated using offsets or zeroing. 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 scenarios (3), (4) and (5) are the granting or denial of offsets relevant to whether dumping is being masked to an extent that the A-A method is not an appropriate comparison method. The extent of the amount of dumping and potential offsets for non-dumped sales is measured relative to the total export value (i.e., the denominator of the weighted-average dumping margin) of the subject merchandise. Thus, the differential pricing analysis does account for the difference in the U.S. prices relative to the absolute price level of the subject merchandise. Only under scenario (5) will the Department find that the A-A method is not appropriate – where there is an above de minimis amount of dumping along with an amount of potential offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful amount. Both of these amounts are measured relative to the total export value (i.e., absolute price level) of the subject merchandise sold by the exporter in the U.S. market.

In turn, only under these circumstances, and in conjunction with the “pattern” requirement being satisfied, may the Department consider the application of the A-T method. Accordingly, scenario (5) represents a difference in U.S. prices which is significant, or large enough relative to the absolute price level of the subject merchandise. In this situation, we find that, when using the A-T method, there is an above de minimis amount of dumping along with a significant amount of non-dumped sales, the offsets of which will meaningfully change the amount of dumping.

The results of our margin calculation for LGE in this case fall within scenario (5). We find that the resulting weighted-average dumping margin moves across the de minimis threshold for LGE. As a result, we continue to find that there is a meaningful difference in the weighted-average dumping margin for LGE that warrants the consideration of the A-T method because the A-A method cannot account for this difference.

Comment 6: Zeroing

LGE challenges the Department's differential pricing methodology with respect to the denial of offsets of positive margins with negative margins, a practice known as "zeroing."⁷⁶ According to LGE, the application of zeroing to at least some sales when the statutory criteria are satisfied and the Department finds that the A-A comparison methodology cannot account for price differences violates World Trade Organization (WTO) precedent. LGE continues that, under the text of international agreements, the determination of dumping must be made with respect to the product as a whole, and not any subset of the product under review. LGE contends that by excluding the negative margins from the overall calculation of an AD margin, the Department is calculating an overall margin that is not based on the product as a whole. LGE asserts that the current methodology inappropriately denies these offsets for non-dumped sales when the Department aggregates the comparison results under the A-T method.

Supported by the same arguments related to the product as a whole and WTO jurisprudence, LGE asserts that the Department also inappropriately "double zeroed" with the alternative comparison method used for LGE in this review where the A-A method was applied to its U.S. sales which did not pass the Cohen's *d* test and the A-T method was applied to its U.S. sales which did pass the Cohen's *d* test. According to LGE, in the Preliminary Results, the Department did not offset the amount of dumping found for those U.S. sales which were evaluated using the A-T method with non-dumped sales (*i.e.*, offsets) which were found for U.S. sales evaluated using the A-A method. LGE asserts that the Department must offset the amount of dumping found when applying the A-T method to the U.S. sales which passed the Cohen's *d* test with the negative comparison results which remain after aggregating the comparison results for the U.S. sales which did not pass the Cohen's *d* test and to which the A-A method was applied.

Finally, LGE argues that the Department should treat the U.S. sales of defective merchandise as a special case and offset any positive dumping margins from this subset of sales with any negative dumping margins on U.S. sales of non-defective merchandise. LGE contends that the sale of defective merchandise is a classic example of a commercially-mandated deviation from normal pricing behavior where a manufacture will seek to minimize the loss on merchandise that cannot be sold in the normal course of business. As such, LGE continues, the relatively low prices for these defective units are not a form of price discrimination but rather the manufacturer's attempt to offset some of its warranty expenses with at least some revenue. Therefore, LGE argues that, in calculating LGE's overall weighted-average dumping margin, any negative dumping margins on the universe of non-defective units sold should be subtracted from any positive dumping margins generated from the sale of defective merchandise.

The petitioner responds that zeroing when applying the A-T methodology is lawful and consistent with the United States' international obligations. The petitioner notes that the CAFC has held that zeroing is legal under U.S. law.⁷⁷ According to the petitioner, Department could

⁷⁶ That is, the negative margins are set to zero.

⁷⁷ The petitioner cites Union Steel v. United States, 713 F. 3d 1101, 1109 (CAFC 2013) (Union Steel), and U.S. Steel Corp. v. United States, 621 F. 3d 1351, 1363 (CAFC 2010) (U.S. Steel Corp.). See Petitioner Rebuttal Brief at page 41.

never truly unmask dumping or affirmatively address targeted dumping without zeroing when applying the A-T method. Therefore, the petitioner asserts, the Department must continue to zero the comparison results for non-dumped sales and not permit them to eliminate the amount of dumping found when the Department has found that a pattern of significant price differences among customers, regions, or periods of time exists.

The Department's Position:

Zeroing With the A-T Method

We agree with the petitioner. As we stated recently in Wood Flooring,⁷⁸ the recent decision by the CAFC in Union Steel resolved the outstanding question of whether the Department's statutory interpretation is reasonable. The CAFC affirmed the Department's explanation that it may interpret the statute to permit the denial of offsets for non-dumped sales with respect to the A-T comparison method in administrative reviews, while permitting the Department to grant offsets for non-dumped transactions when applying the A-A comparison method in investigations. The CAFC also affirmed the Department's explanation that it may interpret the same statutory provision differently because there are inherent differences between the comparison methods used in investigations and reviews. Indeed, the CAFC noted that although the Department recently modified its practice "to allow for offsets when making A-A comparisons in administrative reviews . . . {t}his modification does not foreclose the possibility of using the zeroing methodology when {the Department} employs a different comparison method to address masked dumping concerns."⁷⁹ Likewise, in US Steel Corp., the CAFC sustained the Department's decision to no longer apply zeroing when employing the A-A comparison method in investigations while recognizing the Department's intent to continue to apply zeroing in other circumstances. Specifically, the CAFC recognized that the Department may use zeroing when applying the A-T comparison method where patterns of significant price differences are found.⁸⁰

Moreover, the Department disagrees with LGE's proposition that the denial of offsets with the A-T method is inconsistent with the United States' international obligations. First, U.S. law is consistent with our international obligations, and, as discussed above, the Department has acted in accordance with U.S. law by denying offsets under the A-T comparison method. Moreover, neither the WTO's Dispute Settlement Body nor the Appellate Body have issued reports regarding the denial of offsets with the application of an alternative comparison method based upon the A-T method as described in the second sentence of Article 2.4.2 of the WTO Antidumping Agreement. Furthermore, the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.⁸¹ Congress adopted an explicit statutory scheme in

⁷⁸ See Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Results of New Shipper Review; 2012-2013, 80 FR 41476 (July 15, 2015) (Wood Flooring), and accompanying Issues and Decision Memorandum at Comment 1.B.

⁷⁹ See Union Steel, 713 F.3d at 1106.

⁸⁰ See U.S. Steel Corp., 621 F.3d. at 1351.

⁸¹ See Corus Staal BV v. DOC, 395 F.3d 1343, 1347 (CAFC 2005), cert. denied, 126 S. Ct. 1023 (January 9, 2006); see also the SAA at 659 ("WTO dispute settlement panels will not have any power to change U.S. law or order such a change.").

the URAA for addressing the implementation of WTO reports.⁸² As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute.⁸³ With regard to the denial of offsets when using an alternative comparison method based on the A-T method, the Department has issued no new determination nor has the United States adopted any change to its methodology pursuant to this statutory procedure.

Double Zeroing

As an initial matter, no legal authority requires respondent's approach to aggregating the individual dumping margins for LGE. The Department's application of the "mixed alternative methodology" in calculating LGE's weighted-average dumping margin constitutes a reasonable interpretation of an otherwise silent statute that is well within the gap-filling deference that the Department receives under Chevron, and that the CAFC has recognized in cases like U.S. Steel Corp.⁸⁴ As the CAFC held in U.S. Steel Corp., courts "defer to Commerce's reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by 'the agency's generally conferred authority and other statutory circumstances.'"⁸⁵ Such a "gap" exists with respect to the appropriate manner for the Department to account for masked dumping concerns in antidumping administrative reviews, as the CAFC recently recognized in JB F RAK.⁸⁶ Moreover, when the Department exercises its technical expertise to select and apply methodologies to implement the dictates of the trade statute—in this case the statute's authorization to use the A-T method—courts afford the Department "tremendous deference" that is "both greater than and distinct from that accorded the agency in interpreting the statutes it administers."⁸⁷

Here, if the Department were to offset positive A-T comparison results with negative A-A comparison results (i.e., non-dumped sales) as LGE advocates, it would permit the "re-masking" of dumped sales that the Department had, at that point, "unmasked" through its analysis. Such an approach would defeat the purpose of the statutory provision endorsing the Department's use of the A-T method in the first place. The A-A method and the A-T method are different comparison methods which are provided for in the Act and regulations which are distinct and independent from each other and the results from the calculations under each of these methods (or other methods by which the Department may calculate the amount of dumping for a group of sales, such as facts available or the transaction-to-transaction method) are distinguishable. With respect to LGE in this review, the Department reasonably aggregated the results of each of these distinct comparison methods, specifically summing the amount of dumping and the U.S. sales value for each of these methods. If the Department were to take the additional step advocated by LGE and offset dumped sales from the A-T method with non-dumped sales from the A-A

⁸² See, e.g., 19 USC 3533 and 3538.

⁸³ See, e.g., 19 USC 3538(b)(4) (implementation of WTO reports is discretionary).

⁸⁴ See U.S. Steel Corp., 621 F.3d at 1357.

⁸⁵ Id. (citations omitted).

⁸⁶ See JB F RAK, 790 F.3d at 1364 (holding that the Department's application of A-T method in an administrative review "properly" filled the gap Congress left in the statute).

⁸⁷ See Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (Fujitsu); PSC VSMPO-Avisma Corp. v. United States, 688 F.3d 751, 764 (Fed. Cir. 2012) (quoting Fujitsu).

method, it would defeat the purpose of the A-T method by allowing the results of the A-A method to reduce or completely negate the results of the A-T method prescribed by section 777A(d)(1)(B) of the Act.

Accordingly, the Department has not altered its approach in combining the comparison results between the A-A method and the A-T method.

Defective Merchandise

Furthermore, we find no basis to treat LGE's sales of defective merchandise as a special case with respect to offsetting any positive dumping margins. For the reasons discussed above in Comments 2 through 4, we continued to include these defective merchandise sales in our final margin calculations. We made our CEP to NV comparisons involving defective merchandise in the same statutorily-prescribed manner as our comparisons for non-defective merchandise. Finally, there is no statutory or regulatory basis upon which to deviate from our practice of zeroing when employing the A-T method for defective merchandise sales.

Comment 7: Monthly Time Periods in Differential Pricing Analysis

The petitioner contends that the Department should revise the differential pricing methodology in the Preliminary Results with respect to whether prices differed significantly by time period to a monthly basis, rather than quarterly basis. According to the petitioner, a monthly price analysis more accurately reveals patterns of price differences for comparable merchandise among periods of time, and more effectively unmask LGE's dumped sales. The petitioner states that its analysis demonstrates that significant dumped sales during short promotional periods within a quarter were masked by non-promotional sales that took place during the remainder of that quarter.⁸⁸ Furthermore, the petitioner asserts that testing for patterns of price differences by month is consistent with the Department's practice when the evidence indicates that such an approach is necessary to unmask significant dumped sales.⁸⁹ In addition, the petitioner notes that assessing monthly price differences is consistent with the Department's use of monthly average EPs (or CEPs) in reviews when applying the A-A comparison methodology. Therefore, for the final results, the petitioner asserts that the Department should compare LGE's U.S. sales prices on a monthly basis to determine whether significant and meaningful price differences exist for comparable merchandise among different time periods.

LGE states that the Department has a standard practice to test for time based on quarterly average prices that has been applied consistently in more than 100 different final determinations to a very diverse range of products, and has departed from this standard policy only once, in an isolated case involving a unique factual situation (prices contractually linked to a published price index for the key raw material)⁹⁰ that does not apply here. According to LGE, the only basis that

⁸⁸ See Petitioner Case Brief at Attachment A.

⁸⁹ See, e.g., Seamless Refined Copper Pipe and Tube from the People's Republic of China: Final Results of Antidumping Administrative Review: 2011-2012, 79 FR 23,324 (April 28, 2014) (Copper Pipe and Tube from PRC).

⁹⁰ LGE refers to Copper Pipe and Tube from PRC, and accompanying Issues and Decision Memorandum at Comment 5.

the petitioner presents for departing from the Department's standard practice is the existence of promotional holiday pricing, to which LGE responds that there are holidays and promotional pricing in each quarter, not simply particular months. LGE notes that monthly averages will differ from quarterly averages, and some monthly averages will be, by definition, lower than the quarterly average, yet this inherent feature of quarterly averages was known to the Department when it made the choice to adopt quarterly averages. Therefore, LGE concludes, the petitioner has provided no justification based on any unique facts in this case to depart from the standard practice of testing time using quarterly price averages.

The Department's Position:

In recent proceedings, the Department applied a "differential pricing" analysis for determining whether application of A-T comparisons is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act. When using this methodology, the Department established quarterly time periods as the baseline standard for temporal analysis. The Department consistently used quarterly time periods in recent investigations and reviews.⁹¹ A benefit of a quarterly analysis is that where the Department frequently uses annual comparisons in investigations, and normally uses monthly comparisons in administrative reviews, the use of a quarterly time period provides a uniform and predictable period of time in which the Department may conduct its analysis across proceedings. Still, the Department has maintained that it may modify the definition of time periods where it finds a logical basis for doing so.⁹² To date, the Department has found such a basis in only one instance.⁹³ In Copper Pipe and Tube from the PRC, the Department stated that:

Because a major contractually-determined portion of the price changes monthly, there exists a logical basis for grouping sales by month when examining whether there are prices that differ significantly among time periods.⁹⁴

In the present instance, however, we do not find a logical basis for deviating from our standard quarterly analysis. Unlike Copper Pipe and Tube from the PRC, where the respondent's export pricing was contractually tied to a published monthly index for a raw material (*i.e.*, copper), here, the price of LRWs is free of such commitment.

Furthermore, we do not agree with the petitioner that the evidence on the record shows that the periods of sales promotions (*e.g.*, Black Friday, Independence Day, *etc.*) vary throughout the POR such that there is a direct correlation between holiday promotional periods and monthly pricing patterns. For example, LGE offers numerous rebate and promotion programs, few of which are tied to specific time periods.⁹⁵ Furthermore, in the absence of evidence of a direct

⁹¹ See Xanthan Gum from the PRC, and accompanying Issues and Decision Memorandum, at Comment 3; Differential Pricing Analysis: Request for Comments, 79 FR 26720 (May 9, 2014) ("Time periods are defined by the quarter within the period of investigation or administrative review based upon the reported date of sale."); and Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review; 2012-2013, 79 FR 51309 (August 28, 2014), and accompanying Issues and Decision Memorandum at Comment 1.

⁹² See Differential Pricing Comment Request, at 26722.

⁹³ See Copper Pipe and Tube from the PRC at Comment 6.

⁹⁴ *Id.*

⁹⁵ See QRC at pages C-22 – C-27.

correlation, it would be inappropriate for the Department to presume the reason behind certain changes in prices, and to modify the time period used in its analysis based on that presumption. The CAFC held recently in JB F RAK that section 777A(d)(1)(B) of the Act “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”⁹⁶ Likewise, section 777A(d)(1)(B) of the Act does not require the Department to presume a correlation between prices and certain time periods absent direct evidence to that effect.

Accordingly, we continued to employ quarterly time comparisons in our differential pricing analysis for the purposes of these final results.

Comment 8: Conducting the Sales-Below-Cost-Test Based on Level of Trade

The Department’s methodology executes the sales-below-cost test by first comparing each individual home market sales transaction to the corresponding weighted-average model-specific cost. The program then computes, on a model-specific basis, the percentage by quantity of sales that failed the cost test to determine whether below-cost sales were made in substantial quantities. If the volume of sales that failed the cost test represents 20 percent or more of the volume of sales of a given model, then only those individual sales passing the sales-below-cost test are retained for purposes of calculating NV. However, if the percentage of sales failing the cost test is less than 20 percent, no sales of that particular model are disregarded. This programming step does not distinguish among levels of trade (LOTs). That is, all sales of a given model, regardless of LOT, are aggregated for purposes of determining the percentage that were below cost.

The petitioner contends that the statute requires the Department to account for LOT when applying the sales-below-cost test.⁹⁷ Under the current cost test methodology, the petitioner argues that LGE’s dumping margin is understated. According to the petitioner, because LOT 2 and LOT 3 sales in the home market (LGE’s sales to unaffiliated retailers and large corporate customers, respectively) and LOT 4 sales (downstream sales by an affiliate) are aggregated for the substantial quantities test, the pool of sales used for computing NV includes certain LOT 2 and LOT 3 sales that would have been properly disregarded were it not for the aggregation with the three LOTs under the Department’s cost test.⁹⁸ The results of the cost test, the petitioner asserts, impact price-to-price comparisons because LGE’s U.S. sales, classified as LOT 1 were matched to home market sales made at the next closest LOT as the U.S. sale, *i.e.*, LOT 2/3. In its case brief, the petitioner includes examples where it claims that the Department included

⁹⁶ JB F RAK at *21-*22. See also Borusan at *3.

⁹⁷ The petitioner cites sections 773(a)(7) and (b) of the Act in asserting that, when “applying the sales below cost test, the Department compares the cost of production to the price of home market sales of the ‘foreign like product,’ which are ‘at the same level of trade’ as export price sales. Therefore, the statute mandates that Commerce account for level of trade when defining the universe of sales to which Commerce applies the sales below cost test.” See Petitioner Case Brief at page 12.

⁹⁸ Although LGE reported three levels of trade in the home market, and the petitioner referred to these three LOTs in the Petitioner Case Brief at pages 9-10, the Department preliminarily determined that there are two LOTs in the home market: the retailer/corporate customer LOT, and the downstream retailer LOT. See Preliminary Decision Memo at pages 11-13.

substantial quantities of dumped sales in its margin calculation because the Department failed to account for LOT in its sales-below-cost test.⁹⁹

The petitioner continues that LOT 4 sales were never used for matching purposes and, therefore, the margin calculation program created distortion and masked dumping. This situation occurred, states the petitioner, due to the inclusion of those LOT 2/3 sales that should have been disregarded but for their aggregation with the LOT 4 sales in the cost test, in the calculation of NV for comparison to U.S. sales. Therefore, the petitioner contends that the Department should revise its standard cost test methodology to account for different LOTs when performing the substantial quantities test.

LGE asserts that the petitioner made this same argument in the LTFV investigation and the Department rejected it, pointing to its consistent, predictable and reasonable practice in performing the cost test.¹⁰⁰ LGE also notes that the petitioner fails to cite a single instance where the Department has applied the cost test on an LOT basis, or where a reviewing court has questioned the Department's approach. Rather, LGE cites court decisions that have upheld the Department's methodology.¹⁰¹ Furthermore, LGE disputes the petitioner's claim that the statute requires an LOT-based cost test, asserting that the petitioner's interpretation is flawed. LGE maintains that the statute directs the Department to apply the cost test first to determine the universe of home market sales that can be compared to U.S. sales, and then, after the universe of home market sales has been determined, to compare those home-market sales to U.S. sales made at the same LOT, to the extent practicable.

The Department's Position:

The petitioner raised this same issue in LTFV Final, and we rejected the petitioner's arguments, explaining that:

Under section 773(b) of the Act, below-cost sales may be excluded only if they "have been made within an extended period of time in substantial quantities," and "were not at prices which permit recovery of all costs within a reasonable period of time" The statute is silent as to the precise conduct of the cost test. Further, there is nothing in the Department's regulations or the SAA prescribing a particular methodology for determining whether sales may be disregarded. The SAA provides only that "the cost test generally will be performed on no wider than a model-specific basis" (emphasis added). Where the statute is silent or ambiguous, the determination of a reasonable and appropriate method is left to the discretion of the Department. See, e.g., Chevron U.S.A Inc. v. Natural Resources Defense Council, 467 U.S. 837; 104 S. Ct. 2778 (1984). The Department has, over time, developed a consistent, predictable and reasonable practice in

⁹⁹ See Petitioner Case Brief at Attachment B.

¹⁰⁰ See LGE Rebuttal Brief at pages 14-16 (citing to Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers From the Republic of Korea, 77 FR 75988 (December 26, 2012) (LTFV Final), and accompanying Issues and Decision Memorandum at Comment 6).

¹⁰¹ LGE cites as examples Mitsubishi Heavy Industries, Ltd. v. United States, 15 F. Supp. 2d 807 (CIT 1998); Thai Pineapple Canning Industry Corp. v. United States, 273 F.3d 1077 (CAFC 2001); and SeAH Steel Corp v. United States, 704 F. Supp. 2d 1353 (CIT 2010). LGE adds that none of these cases specifically addressed the matter of performing the cost test on an LOT basis because no party has previously argued such a methodology. However, LGE states that the cases support the Department's cost test methodology as it has been applied over the years.

this regard to perform the sales-below-cost test and the “substantial quantities” test on a model-specific basis. See, e.g., Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 67 FR 55780 (August 30, 2002), and accompanying Issues and Decision Memorandum at Comment 37. The Courts have sanctioned this model-specific approach for conducting the cost test. For example, in Mitsubishi Heavy Industries, Ltd. v. United States, 22 CIT 541; 15 F. Supp. 2d 807 (CIT 1998), the CIT held that “the model-specific cost test represents a permissible application of the statute” and that “[u]se of the model-specific cost test is part of Commerce’s usual practice.”¹⁰²

Earlier this year, the CIT affirmed the Department’s LTFV Final determination on this issue, concluding:

Commerce’s long-standing sales-below cost test addresses the statute’s explicit “extended period of time and in substantial quantities” criteria as well as the SAA’s specification that Commerce conduct the test on no wider than a model-specific basis. Whirlpool identifies a different approach based on level of trade that, in its view, has certain advantages and would have led to a different determination below. Whirlpool, however, fails to demonstrate that its preferred approach is the only correct interpretation of the statute. The court therefore agrees with Defendant and LG that Commerce’s established sales-below-cost test, which does not account for level of trade, must be sustained as a reasonable interpretation of an otherwise silent statutory provision.¹⁰³

In the instant review, the petitioner offers no new basis for the Department to reconsider its decision in the LTFV Final. Accordingly, for the final results, we continued to follow our long-established practice of conducting the sales-below-cost test and substantial quantities test on a model-specific basis, without distinguishing between different LOTs.

¹⁰² See LTFV Final at Comment 6.

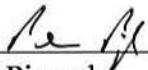
¹⁰³ See Samsung Electronics Co., Ltd. v. United States, 70 F. Supp. 3d 1350 (CIT 2015).

RECOMMENDATION

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

✓
Agree

Disagree


Paul Piquado
Assistant Secretary
for Enforcement and Compliance

8 SEPTEMBER 2015
(Date)