A-580-810
Administrative Review
12/01/2013 - 11/30/2014
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Office VII: LW

July 11, 2016

MEMORANDUM TO: Ronald K. Lorentzen
                        Acting Assistant Secretary
                          for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
                        Antidumping Duty Administrative Review: Welded ASTM A-312
                        Stainless Steel Pipe from the Republic of Korea; 2013-2014

Summary

We have analyzed the case and rebuttal briefs submitted by the interested parties. As a result of our analysis, we made changes to the margin calculation for SeAH Steel Corporation (SeAH). Further, we made no change to the margin assigned to LS Metal Co., Ltd. (LS Metal). We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments from interested parties:

1. Alignment of Product Characteristics – End Finish to Those from Recent Investigations
2. Applicability of Cost of Production Methodology from *Line Pipe*[1]
3. Applicability of U.S. Indirect Selling Expenses Methodology from *Line Pipe*[2]
4. Differential Pricing Analysis is Not Consistent with the Requirements of the Statute or with Basic Principles of Statistical Analysis

Background

On January 7, 2016, the Department of Commerce (Department) published in the *Federal Register* the preliminary results of this review.[3] We tolled the deadline for issuing final results by four business days to May 13, 2016,[4] which we extended to July 1, 2016.[5]

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[1] *See Welded Line Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015) (*Line Pipe*) and accompanying Issues and Decision Memorandum (IDM) at Comment 5.
[2] *Id.* at Comment 20.
[3] *See Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 742 (January 7, 2016) (*Preliminary Results*).

SeAH submitted new factual information with respect to differential pricing on November 20, 2015. The Department placed additional information concerning differential pricing on the record on February 11, 2016.[6] Petitioners and SeAH placed rebuttal information on the record on February 18, 2016.[7]

Petitioners and SeAH each submitted case briefs on February 23, 2016 and rebuttal briefs on February 29, 2016.[8]

Scope of the Order

The merchandise subject to the antidumping duty order is welded austenitic stainless steel pipe that meets the standards and specifications set forth by the American Society for Testing and Materials (ASTM) for the welded form of chromium-nickel pipe designated ASTM A-312. The merchandise covered by the scope of the orders also includes austenitic welded stainless steel pipes made according to the standards of other nations which are comparable to ASTM A-312.

Welded ASTM A-312 stainless steel pipe is produced by forming stainless steel flat rolled products into a tubular configuration and welding along the seam. Welded ASTM A-312 stainless steel pipe is a commodity product generally used as a conduit to transmit liquids or gases. Major applications for steel pipe include, but are not limited to, digester lines, blow lines, pharmaceutical lines, petrochemical stock lines, brewery process and transport lines, general food processing lines, automotive paint lines, and paper process machines.

Imports of welded ASTM A-312 stainless steel pipe are currently classifiable under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 7306.40.5005, 7306.40.5015, 7306.40.5040, 7306.40.5062, 7306.40.5064, and 7306.40.5085. Although these subheadings include both pipes and tubes, the scope of the antidumping duty order is limited to welded austenitic stainless steel pipes. The HTSUS subheadings are provided for convenience and customs purposes. However, the written description of the scope of the orders is dispositive.

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[4] As explained in the memorandum from the Acting Assistant Secretary for Enforcement and Compliance, the Department has exercised its discretion to toll all administrative deadlines due to the recent closure of the Federal Government. *See* Memorandum to the Record from Ron Lorentzen, Acting A/S for Enforcement & Compliance, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During Snowstorm Jonas," dated January 27, 2016. All deadlines in this segment of the proceeding have been extended by four business days.
[5] *See* the Department's April 27, 2016 memorandum.
[6] *See* the Department's February 11, 2016 memorandums entitled "Acceptance of SeAH's New Factual Information Submitted on November 20, 2015" and "Reference Sources for Differential Pricing Analysis."
[7] Petitioners are Bristol Metals LLC, Felker Brothers Corporation, and Outokumpu Stainless Pipe, Inc. *See* Petitioners' February 18, 2016 submission; *see also* SeAH's February 18, 2016 submission.
[8] *See* Petitioners' and SeAH's February 23, 2016 case briefs and February 29, 2016 rebuttal briefs.

Affiliation based on Close Supplier Relationship

In the *Preliminary Results*, we preliminarily found that SeAH and Pohang Iron & Steel Co., Ltd. (POSCO) did not have a close supplier relationship, and therefore were not affiliated, during the period of review (POR).[9] No party submitted comments with respect to this preliminary finding. As the record contains no other information or evidence that calls into question our preliminary finding, the Department adopts the reasoning and findings of facts outlined in the *Preliminary Results* with respect to this issue. Therefore, we continue to find that SeAH and POSCO were not affiliated during the POR.

Use of Adverse Facts Available (AFA)

In the *Preliminary Results*, we preliminarily assigned an AFA rate of 31.70 percent to LS Metal.[10] No party submitted comments with respect to this preliminary finding. As the record contains no other information or evidence that calls into question our preliminary finding, the Department adopts the reasoning and findings of facts outlined in the *Preliminary Results* with respect to this issue. Therefore, we continue to assign the AFA rate of 31.70 percent to LS Metal in the final results.

Change Since Preliminary Results

We recalculated SeAH's U.S. indirect selling expenses. *See* Comment 3 and Final Calculation Memorandum.[11]

Discussion of Issues

Comment 1: Alignment of Product Characteristics – End Finish to those from Recent Investigations

Petitioners Argue:

- The distinction between plain and beveled ends was drawn more than 24 years ago when the investigation was initiated. For the final results, they should be grouped together as they are in the recent investigations of Welded Stainless Pressure Pipe from Malaysia, Thailand, the Socialist Republic of Vietnam, and India (*WSPP*).

- The difference between plain-end and beveled-end finish is an artificial distinction that the respondents subject to multiple reviews have learned to manipulate to mask dumping.
  - o Beveled-end represented a tiny percentage of U.S. sales.
  - o Beveled-end was priced lower for the grades that were sold only in the home market, on average, but was priced higher for the grades that were sold in both markets.

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[9] *See Preliminary Results* and accompanying Decision Memorandum (PDM) at 7.
[10] *Id.* at 12.
[11] *See* the Department's July 11, 2016 memorandum entitled "Antidumping Duty Administrative Review of Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea: Final Results Margin Calculation for SeAH Steel Corporation" (Final Calculation Memorandum).

o Beveled-end had no cost differentiation with plain-end for the grades that were sold only in the home market, but had consistent much higher costs for the grades that were sold in both markets.

SeAH Argues:

- Petitioners' request is nothing more than a cynical effort to take advantage of differences in the mix of products sold in the United States and home market to create dumping margins.
  o Plain-end and beveled-end pipes are not identical products. Customers specify the type of end finish, which SeAH must supply.
  o The fact that product characteristics in other cases are different does not mean the one in this case should be modified, as it is determined on a case-by-case basis and nothing has changed in this case that should lead to a modification.
  o Petitioners have not provided any evidence showing that beveled-end is not reflective of the subject merchandise, or that industry-wide changes necessitate a modification, or that any other compelling reason exists to change the current reporting requirements.

- Petitioners' analysis improperly lumps together products with different diameters and wall thicknesses, instead presenting only the average prices or costs for all plain-end and all beveled-end products with the same grade. For the five pairs of control numbers that would have been directly affected by Petitioners' suggestion:
  o The average prices for beveled-end products were more than 20 percent higher than that for plain-end products with otherwise identical characteristics in both markets.
  o More than 99 percent of total U.S. sales versus only 28 percent of home market sales are the lower-priced plain-end products.
  o The combined weighted-average price for both products in the home market will be higher than that in the U.S. market.

Department's Position:

We have not modified the End Finish type model match criteria for these final results. As a general matter, more specific product characteristics provide more accuracy in margin calculations. Furthermore, there is no evidence on the record which indicates that SeAH has manipulated the differences between beveled-end and plain end pipe in its responses to mask dumping. Rather, SeAH has reported its sales and costs using the product characteristics established for this case some 24 years ago.

Petitioners have argued that the product characteristics used in the recent *WSPP* are more reasonable than the product characteristics used in this proceeding which were developed 24 years ago.[12] We note that the appropriate time to consider comments with respect to the physical characteristics and model match criteria is at the beginning of the proceeding.[13] Further, in

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[12] *Id*; *see also* Petitioners' February 23, 2016 case brief.

[13] *See*, *e.g.*, *Diamond Sawblades and Parts Thereof From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 71980 (December 4, 2014) and the accompanying Decision Memorandum at 4, unchanged in *Diamond Sawblades and Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 32344 (June 8, 2015); *see*

general, the Department revises the model-match criteria when there is evidence that 1) the current model-match criteria are not reflective of the merchandise in question, 2) there have been industry-wide changes to the product that merit a modification, or 3) there is some other compelling reasons. In all cases, an interested party wishing to change the model-match criteria established by the Department bears the burden of demonstrating in a timely fashion that a revision is warranted.

The Department issued its questionnaire instructing SeAH to report its sales and costs distinguishing between plain and beveled ends on March 2, 2015.[14] SeAH responded to the questionnaire and supplemental questionnaires on April 22, 2015, August 12, 2015 and September 10, 2015.[15] The record of this review shows that Petitioners raised the issue of beveled and plain end product characteristics in their pre-preliminary comments on October 16, 2015.[16] Thus, Petitioners first raised issues regarding the product characteristics in this case 228 days after the Department issued its questionnaire, as well as 177 days after SeAH submitted databases for home market sales, U.S. sales and cost of production, 65 days after SeAH submitted a revised U.S. sales database, and 36 days after SeAH submitted revised databases for home market and U.S. sales.[17]

We therefore find that requiring SeAH to belatedly revise all three databases which then would also need to be examined by the Department would have imposed an undue burden on SeAH and the Department in this review. Accordingly, we are not modifying our model match criteria.

We note that interested parties have already submitted model match characteristic comments in the recently initiated 2014-2015 administrative review. We intend to consider timely comments on the model match criteria in that segment of the proceeding.

Comment 2: Applicability of Cost of Production Methodology from *Line Pipe*

Petitioners Argue:

- SeAH reported significantly different costs for nearly identical CONNUMs, a similar issue as what occurred in *Line Pipe* where the Department re-allocated SeAH's fabrication costs among products with common outside diameter.

- Applying the same methodology used in *Line Pipe* would be an improvement over the current reporting of cost.

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also Carbazole Violet Pigment 23 from India: Final Results of Antidumping Duty Administrative Review, 75 FR 38076 (July 1, 2010) and accompanying Issues and Decision Memorandum at Comment 2.

[14] *See* the Department's March 2, 2015 letter to SeAH.

[15] *See* SeAH's April 22, 2015 Section B, C, and D responses, August 12, 2015 and September 10, 2015 supplemental responses.

[16] *See* Petitioners' October 16, 2015 Pre-Preliminary Comments at 2; *see also* Petitioners' December 9, 2015 Pre-Preliminary Comments.

[17] *See* SeAH's April 22, 2015 Section B, C, and D responses, August 12, 2015 supplemental responses, and September 10, 2015 supplemental responses.

SeAH Argues:

- Cost of production is reported in accordance with the Department's explicit instructions and based on the actual costs recorded in normal cost accounting system.

- If Petitioners had raised this issue earlier in the proceeding, it would have been possible for the Department to inquire into the precise circumstances of the production cost for the products identified. Now SeAH can only address the issue in somewhat general terms:
  o Petitioners have cherry-picked a few small-quantity outliers where production quantity is less than one-tenth of average production quantity, without identifying any alleged distortions in the costs for products with more typical production quantities. It is also possible that the different costs reflect timing, or efficiency, or utilization of production.
  o Products in Petitioners' comparison differ in diameter or wall thickness or surface finish; thus, it is to be expected that there will be some difference in costs between them.

Department's Position:

Section 773(f)(1)(A) of the Tariff Act of 1930, as amended, advises that "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles (GAAP) of the exporting country" and "reasonably reflect the costs associated with the production and sale of the merchandise." Accordingly, the Department's normal practice is to rely on a company's normal books and records if these two conditions are met.

We have not accepted Petitioners' suggestion that the Department should apply the cost of production methodology from *Line Pipe*. In this case, SeAH's reported conversion costs are derived from its normal books and records and those books and records are kept in accordance with Korean International Financial Reporting Standards.[18] Hence, the question is whether the reported conversion costs from SeAH's normal books and records reasonably reflect the costs associated with the production and sale of the subject merchandise. As Petitioners pointed out, SeAH's reported cost database showed some differences in conversion costs for products with similar physical characteristics.[19] Furthermore, Petitioners' June 3, 2015 comments suggest that it may be more accurate to allocate conversion costs on the basis of relative product-specific standards. Accordingly, the Department requested, and SeAH provided, information for product-specific conversion costs which were allocated based on its standard processing times. These standard product-specific conversion costs were provided in addition to the cost database[20] based on the actual product-specific conversion costs as recorded in SeAH's normal books and records. We note that in *Line Pipe* these standard product-specific conversion costs were not on the record. As such, our analysis of the cost differences in this case is different from *Line Pipe*.[21]

To determine whether the reported conversion cost differences between similar products are reasonable, we compared the actual and standard product-specific cost data and note that the

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[18] *See* SeAH's April 22, 2015 Section D response at 10.
[19] *Id. at* cost database "seah_sts_cop01."
[20] *See* SeAH's August 12, 2015 supplemental response exhibit SD-5.
[21] *See Line Pipe* IDM at Comment 5.

relative differences in conversion costs among similar products based on the standard processing times reasonably approximated the differences in conversion costs among products based on SeAH's normal books and records.[22] While there are some outliers in the reported product-specific conversion costs, these outliers were generally associated with products having small production quantities and are insignificant in relation to the reported overall production.[23] Therefore, we consider it reasonable to rely on SeAH's reported product-specific conversion costs, as recorded in accordance with its normal books and records, for the final results.

Comment 3: Applicability of U.S. Indirect Selling Expenses Methodology from *Line Pipe*

SeAH Argues:

- The Department should follow the calculation methodology that it verified and accepted in *Line Pipe*, in which the Department directed SeAH to exclude general and administrative expense (G&A) from U.S. indirect selling expense (ISE) and report them as part of the further-manufactured cost.
    o In order to achieve consistency in these two cases for which the periods overlap by 10 months, SeAH used methodology from that investigation to recalculate the expense in this review.
    o The Department incorrectly disregarded SeAH's recalculation in the preliminary results, and falsely asserted that SeAH did not correctly follow the methodology from that investigation. However, SeAH's revised calculation in this review is identical to the one in that investigation.
    o The affiliated reseller's G&A expense should not be classified as ISE, even though the company's further manufacturing activities did not pertain to the subject merchandise in the present case.

- The Department should exclude three items from the ISE: (1) rental income to offset depreciation; (2) other expense; (3) claim expenses, to be consistent with the methodology from *Line Pipe* and which were verified by the Department to be accurate.
    o The Department's decision to defer "Petitioners' contentions" is unseemly and legally improper. It has an obligation to request the information needed to resolve any doubts, and to make its own independent judgment based on the facts.

Petitioners Argue:

- While the Department was correct to disregard SeAH's revised calculation, the methodology used in *Line Pipe* was incorrect insofar as it applies to SeAH and its affiliated reseller.
    o Both in *Line Pipe* and in this case, the affiliated reseller is purely a selling entity that is not engaged in further manufacturing *per se*, even regarding *Line Pipe*.
    o The G&A deducted is based on a percentage for which the verification report from *Line Pipe* provides no indication it was solely dedicated to overseeing further manufacturing as opposed to general "administrative….categories."

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[22] *Id.*
[23] *Id.*

o SeAH needs to provide more information to support its claim that its affiliated reseller also incurs costs associated with further manufacturing. Absent that, when the affiliated reseller does not itself engage in further manufacturing, most of its selling, general and administrative expense (SG&A) should be included in ISE.

- With regard to the exclusions from the ISE, the Department made its own determination, and provided its own reason for deciding not to exclude them.

Department's Position:

The record of this review shows that SeAH's affiliated reseller further manufactures non-subject merchandise such as in *Line Pipe*.[24] Thus, the affiliated reseller's employees are responsible for overseeing and coordinating both sales and further manufacturing activities of the company. As the Department explained in *Line Pipe*, as a general rule, when faced with such facts, the Department calculates separate ISE and G&A ratios and applies the "G&A ratio to the total cost of further manufactured products…as well as to the cost of all non-manufactured products."[25] We have done this for these final results.

We have therefore revised the ISE ratio and we calculated a G&A ratio for SeAH's affiliated reseller.[26] Because the affiliated reseller's G&A activities support the general activities of the company as a whole, including its sales and further manufacturing functions, following our methodology used in *Line Pipe* we applied the G&A expense ratio to the cost of all subject merchandise sold by the affiliate.[27]

We recognize that under this method there is a theoretical difference between how the G&A ratio is calculated (*i.e.*, based on the affiliated reseller's cost of goods sold that represents SeAH's transfer price for the pipe), and how it is applied (*i.e.*, to the cost of producing the pipe). However, we consider such an approach reasonable, as it avoids the double counting of costs, allocates all of the company's G&A expenses and, given the size of the G&A ratio, any difference resulting from the theoretical difference noted above is negligible.[28]

Finally, we revised our calculation of ISE to: (1) offset depreciation expenses for certain buildings that the affiliated reseller owned to account for rental income generated by those buildings; (2) exclude certain "other expenses" which were actually "other income"; and (3) exclude "claims expenses" that were also reported as warranty expenses.[29] The Department continues to treat SeAH's warranty expenses as direct expenses in its margin calculations.[30]

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[24] *See* SeAH's August 12, 2015 response at 15 and Appendix SC-4.
[25] *See Line Pipe* IDM at Comment 20.
[26] *See* Final Calculation Memorandum.
[27] *Id.*
[28] *See Line Pipe* IDM at Comment 20.
[29] *See* SeAH's August 12, 2015 response at 15 and February 23, 2016 case brief at 9-10.
[30] *See* the Department's December 21, 2015 memorandum entitled "Calculation for the Preliminary Results of SeAH Steel Corporation in the Antidumping Duty Administrative Review of Welded ASTM A-3123 Stainless Steel Pipe from the Republic of Korea" at 5 (unchanged in final calculations) and Final Calculation Memorandum and accompanying calculation spreadsheet and margin calculation program.

SeAH explained the nature of those expenses in its submission,[31] and stated that they are the same expenses that the Department verified and excluded in *Line Pipe*,[32] the POI of which overlaps the POR of this review by 10 months. Thus, consistent with the Department's finding and decision in *Line Pipe*, we excluded the above three items.

Comment 4:   Differential Pricing Analysis is not Consistent with the Requirements of the Statute or with Basic Principles of Statistical Analysis

SeAH Argues:

- Because the "Differential Pricing Analysis" applied in the preliminary results routinely generates "false positives" from random pricing data with the same structure as SeAH's U.S. sales data, a positive result does not indicate that a "pattern" exists that satisfies the statutory requirements.

- The conceptual flaws in the "Differential Pricing Analysis" explain (at least in part) why the results of the "Differential Pricing Analysis" have no meaning in this case.
  o The cut-offs proposed by Professor Cohen depend on the assumptions of normal distributions that have equal variances or equal sample sizes.
  o The cut-offs have no meaning when the samples are not normally-distributed, or when they do not have equal variances or equal sample sizes.
  o SeAH's U.S. sale prices did not follow a normal distribution.
  o The Department's own explanation from *Line Pipe*[33] using bags of M&Ms requires a normal distribution in order to predict the color of the next candy picked from the bag.

- The numerical cut-offs utilized in the Department's "Differential Pricing Analysis" are arbitrary and improper.
  o Dr. Cohen's "small," "medium," and "large" thresholds are arbitrary and cannot be applied as bright-line tests.
  o The Department has offered no justification for the 33- and 66-percent thresholds.

- The "Differential Pricing Analysis" fails to explain why a pattern of prices that differ significantly were not, or could not be, taken into account using the average-to-average method.
  o The mere existence of different calculated results is plainly insufficient, by itself, to satisfy the statutory requirement.
  o Differences in the results generated by the application of "zeroing" are not the same as differences in the results caused by a pattern of prices that differ significantly by purchaser, region, or time period.

- Under the relevant provisions of the statute, the Department is not permitted to utilize the average-to-transaction method for any of SeAH's U.S. sales.

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[31] *See* SeAH's August 12, 2015 response at Appendix SC-4.
[32] *See* SeAH's February 23, 2016 case brief at 9-10.
[33] *See Line Pipe* IDM at comment 1 on page 21-22.

- o Neither Petitioners nor the Department have established that there is a pattern of U.S. prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time in SeAH's U.S. sales data.
- o The Department should limit the average-to-transaction method to the transactions that fall within the alleged pattern of prices that differ significantly, and should not "zero" for negative comparison results in the event that the Department decides to utilize the average-to-transaction method.

- The Antidumping Agreement from the World Trade Organization (WTO) as well as the WTO Appellate Body have held that the average-to-transaction method can only be applied to the export sales which are found to constitute a pattern of prices that differ significantly.

Petitioners Argue:

- In *Apex Frozen Foods*,[34] the U.S. Court of International Trade (CIT) affirmed the Department's differential pricing analysis against a wide range of claims – including those advanced in this review.

Department's Position:

1. The Department's "Differential Pricing Analysis" produces "false positives" as it finds "patterns" in purely random data, and thus does not satisfy section 777A(d)(1)(B)(i) of the Act.

The Department disagrees with SeAH's assertions, as they are not only unsupported by the record but also illogical. As an initial matter, a respondent exporter's and/or producer's pricing behavior cannot reasonably be considered to be "random." Any rational enterprise has established corporate priorities and goals which are reasonably determinative of its pricing behavior. In a market economy, such as Korea, one primary set of goals is to maximize revenue and minimize costs in order to generate the greatest return for the owners of the enterprise. To consider that any such company's pricing behavior, including SeAH's, would result in random prices is nonsensical. Indeed, SeAH appears to acknowledge this fact in its case brief.[35] Nonetheless, SeAH continues down this illogical path:

Like all sellers in a competitive market, the prices for SeAH's sales reflect market prices, which in turn are determined by the interplay of aggregate supply and demand for all market participants. There is economic research suggesting that market prices are indistinguishable from a "random walk" – that is, a pattern where the price on each day is simply the result of adding or subtracting a random amount to or from the previous day's prices. *See*, *e.g.*, *J. Groen and P. Pesenti*, *"Commodity Prices, Commodity Currencies, and Global Economic Develpments," NBER Working Paper 157* (Feb. 2010) at 3 ("across commodity indices we

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[34] *Apex Frozen Foods Private Ltd. v. United States,* Slip Op. 2016-09 (CIT February 2, 2016), *appeal pending* (*Apex Frozen Foods*).

[35] *See* SeAH's February 23, 2016 Case Brief at 13 ("We should note that this analysis is not based on the assumption that SeAH sets its prices using a random number generator.).

cannot generate forecasts that are, on average, structurally more accurate and robust than those based on a random walk or autoregressive specifications.").[36]

The fact that commodity indices, according to the cited paper, may follow a "random walk or autoregressive specification" is inapposite with respect to SeAH's pricing behavior in the U.S. market. A commodity index (for which there is no evidence on the record that any such index exists for the subject merchandise) is based on a multitude of transactions between many buyers and sellers. SeAH's commercial experience is not a commodity index. Specifically, SeAH's U.S. sales data represent the sale prices between a single seller, and individual buyers, and thus are not representative of a commodity index. To the contrary, if such an index for the subject merchandise exists, SeAH's sales would be, collectively, a component of the data for such an index along with all of the other sellers and buyers of subject merchandise.

SeAH's sale prices and pricing behavior, in and of themselves, however, do not constitute such a market index. Instead, market prices and conditions are merely one factor which would influence SeAH's pricing behavior, along with other factors, such as customer relationships, the terms of sale, and the goal of maximizing profit. It is a combination of all of these factors which influence SeAH's pricing decisions in the U.S. market.

SeAH is challenging the Department's use of its differential pricing method to determine if there is "a pattern of export prices" for "comparable merchandise that differ significantly among purchasers, regions or periods of time," pursuant to section 777A(d)(1)(B)(i) of the Act. This method is part of a more comprehensive analysis under the Act in which the Department is tasked with evaluating whether SeAH has dumped subject merchandise in the U.S. market, and the very reason the Department uses the differential pricing method is to determine if the use of average-to-average or average-to-transaction comparisons is appropriate given SeAH's pricing data (and decisions as reflected through that data) on the record. The Department's use of the differential pricing method is therefore reasonable because, despite SeAH's arguments to the contrary, even when no pattern exists, its commercial behavior is still not "random," but the result of many factors in a market economy.

Likewise, the information provided on the record by SeAH also discredits its assertions regarding random pricing data. On the first page of SeAH's printout of its "randomized" data,[37] where observation 3 and 5 are for the same product control number (CONNUM), the relative differences in the gross and net U.S. prices are 5.27 percent and 3.66 percent, respectively. In contrast, the "randomized" price data for observation 3 ranges from 0.02382 to 0.95529, and, for observation 5, from 0.05969 to 0.90248. For given pairs of data (*i.e.*, for each of the ten sets of "randomized" data), the differences between the prices for these two observations range from 89.42 percent (set 8) to 5.11 percent (set 5). Quite obviously, SeAH's randomized data has no relationship to the reality of its own pricing behavior in the U.S. market. Such hypothesizing by SeAH is clearly without merit.

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[36] *Id.* at footnote 20.
[37] *See* SeAH's November 20, 2015 submission at Attachment 4-C, page 117 of the PDF attachment, barcode 3419104-02.

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2. The Conceptual Flaws in the "Differential Pricing Analysis" Render It Meaningless

On pages 14 to 30 of its case brief, SeAH alleges one overarching flaw in the agency's differential pricing analysis: the Department has not addressed the assumptions of a normal distribution of the sampled data with equal variances and sample sizes. Furthermore, SeAH rejects the Department's response to these same issues made by SeAH in earlier proceedings.[38] The Department continues to disagree with SeAH in these final results on this claim.

As an initial matter, SeAH posits that its U.S. sales data submitted for this administrative review do not constitute a population of data, but rather are "only a portion of the total universe of U.S. sales made by a respondent,"[39] either encompassing a broader time period or including both subject and non-subject merchandise. Such claims are meritless. The purpose of this administrative review is to analyze the pricing behavior of SeAH during the specified time period and to calculate its weighted-average dumping margin and importer-specific assessment rates. The Department's analysis is based on SeAH's U.S. sales of subject merchandise during this period of review, and the description of the merchandise at issue and the period of review itself are both specifically defined. Accordingly, the set of U.S. sales under analysis are both unique and complete by definition – *i.e.*, a population. In conducting its analysis, the Department must determine whether the average-to-average method is appropriate to calculate SeAH's weighted-average dumping margin,[40] and, as described in the PDM, the Department has followed the statutory provisions for a less-than-fair-value investigation[41] to this end. Thus, consistent with the statute and the Department's regulations, the Department has conducted its analysis, including the calculation of a SeAH weighted-average dumping margin and a differential pricing analysis, to determine whether the average-to-average method is appropriate to calculate such margin, using the entire population of SeAH U.S. sales of subject merchandise during the instant period of review. Accordingly, SeAH's claims in this regard are without merit.

As additional support for its argument that normality is a prerequisite for the Department's analysis, SeAH conflates Dr. Cohen's concepts of "effect size" with "power analysis."[42] This argument also fails. In a power analysis, the required statistical significance, effect size and sample size are inputs for determining the robustness of a given analysis. Effect size is only one of the determinant factors when designing a research project for a desired power, where the other two factors are related to the sampling technique used in the project. As discussed above, the Department's differential pricing analysis in this administrative review examines all U.S. sale

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[38] *See*, *e.g.*, *Line Pipe* IDM at comment 1 on page 19-24.

[39] *See* SeAH's February 23, 2016 Case Brief at 15, footnote 23.

[40] *See* 19 CFR 351.414(c)(1).

[41] *See Preliminary Results* PDM at 4 ("In less-than-fair-value investigations, the Department examines whether to compare weighted-average normal values with the export prices (or constructed export prices) of individual sales (*i.e.*, the average-to-transaction method) as an alternative comparison method using an analysis consistent with section 777A(d)(l)(B) of the Act. Although section 777A(d)(1)(B) of the Act does not govern the Department's examination of this question in the context of administrative reviews, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in administrative reviews is analogous to the issue in less-than-fair-value investigations." (citations omitted)).

[42] *See* SeAH's February 23, 2016 Case Brief at 16, footnote 26. The quoted text provided by SeAH is not at the page 27 of Cohen's text, however, Cohen's discussion of "power analysis" does begin at page 27.

prices and thus sampling is not relevant. Although the distribution of the sampled data is certainly an intrinsic factor in a power analysis, such an analysis is not at issue here.

Likewise, SeAH's reference to the Department's M&M example is misplaced.[43] The Department's M&M example was set forth in the *Line Pipe* IDM for the purpose of explaining why SeAH's claim requiring normality in that investigation was incorrect and to explain "the distinctions between statistical analysis, random sampling, and statistical significance and the role of a normal distribution in each of these."[44]

The Department disagrees with SeAH's contention that the Department must verify that a normal distribution exists in order for the Department's Cohen's *d* analysis to be valid. SeAH appears to misunderstand the distinctions between statistical analysis, random sampling, and statistical significance and the role of a normal distribution in each of these.

A "statistical analysis" is another name for data analysis – what the Department does in every proceeding to calculate a weighted-average dumping margin or a cost of production. In this context, "data" and "statistical" can be considered synonymous, just as data and statistics can be as well (*e.g.*, import statistics are simply data points which quantify the imports of a given country). As an example, a one-pound bag of M&Ms will have candy with blue, green, yellow, red and brown coatings. To count up the number of each color in this individual one-pound bag and to calculate the percentages of each color relative to the total number of candies in the bag is a statistical analysis. Likewise, a "statistical measure" is merely a value which quantifies some aspect in a statistical analysis. The number (*i.e.*, frequency) and proportion of each color of candy in the one-pound bag of M&Ms are each statistical measures.

In this example, if there exists only a single, one-pound bag of M&Ms, then the range of the color of candies in that bag would reflect the colors of these candies for the entire universe of M&Ms. However, if this one-pound bag is only one of ten thousand bags filled at a given plant on October 5, 2015, then one may consider the number and proportion of the color of candies in this bag to be a sample of the production at that plant on that day. If there was no inherent bias in how these bags of M&Ms were filled on October 5th at the M&M factory, then the sample represented in the one-pound bag under examination may be considered a "random sample." If this is so, then any one of the other 9,999 bags of M&Ms filled on October 5th could also be considered as a random sample of the number of each color of candy produced on that fifth day in October.

Lastly, "statistical significance" quantifies the randomness, or sampling error, or "noise" that is inherent in any sample from a population universe. In this example, at the M&M factory, the number of candies of each color is distributed equally, such that each color has 20 percent of the total number of candies made that day. In the one-pound bag which has 500 candies and for which we counted the number of each color, there are 102, 94, 99, 104 and 100 blue, green, yellow, red and brown candies, respectively. Each of these five values is an estimate of the number of each color of candy produced on that day. The difference between these numbers (*i.e.*, estimated values) and the actual number of each color produced (*i.e.*, 100 for each color for a

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[43] *See* SeAH's February 23, 2016 Case Brief at 14.
[44] *See Line Pipe* IDM at Comment 1 on page 21-22.

500-count bag) reflects the randomness of the sample or its sampling error. If the number of each color of candy were calculated for another, and another, one-pound bag of M&Ms, then these numbers may, or mostly likely will, be different from the first bag and also from the actual numbers from the factory as a whole.

The statistical significance of the number of each color of candies in a single one-pound bag measures how accurate and confident one is of this estimation to represent the actual distribution of the colors of different candies for the factory as a whole. A typical way to express this would be that with 95 percent confidence that the number of each color of candy in a one-pound bag is between 95 and 105. This estimate, with the associated statistical significance or statistical inference, has the principle assumption of a normal distribution of the underlying randomness of the sample. A normal distribution is a primary characteristic of a random sample.

Nonetheless, in the Department's analysis of SeAH's U.S. price data, it has all of the prices of SeAH's sales in the U.S. market during the POI. When the Department calculates a Cohen's *d* coefficient, preceded by its constituent means and standard deviations of the test and comparison groups, these values include the complete population universe of SeAH's U.S. price data. This is equivalent to having all of the data from the M&M factory for that day's production of ten thousand one-pound bags of M&Ms. The Department is not limited, as implied by SeAH's arguments, to only knowing the number of each color of candy in a single one-pound bag.

SeAH's liberal scattering of terms and concepts like t-test, power analysis, samples, "randomly and independently drawn from normal populations," sample size and "normal distribution" all reflect SeAH's attempt to obfuscate the issue. Such diversions are not relevant to the Department's analysis as explained above, and SeAH's claims are meritless.[45]

The Department's explanation on this point was issued in response to SeAH's argument in *Line Pipe*, as here, that the data upon which the Department's analysis is based must exhibit a normal distribution under the presumption that this data represents a data sample and not a complete population. As discussed above, SeAH's U.S. sales data represent all of its relevant sales during the period of review – *i.e.*, not a data sample from a broader universe of sales. However, in SeAH's case brief, SeAH misunderstands the Department's explanation in *Line Pipe*, and incorrectly claims that the Department believes that "statistical principles used to predict the color of an M&M picked at random from a bag (to use the Department's example) have no bearing when all of the M&Ms are in front of you."[46]

SeAH's claim in this regard is confusing and incorrect. The use of a probability analysis – guessing the color of an M&M picked at random – is not the Department's analysis when it uses a differential pricing analysis. By definition, an M&M picked at random is a sample of "all of the M&Ms {that} are in front of you," where the statistical parameters used to make such a prediction are based on the distribution of colors in the population of M&Ms "in front of you." Predicting what SeAH's pricing behavior <u>will be</u> in a given instance, however, is not the purpose of the Department's analysis when it uses a differential pricing analysis. The Cohen's *d* test evaluates the significance of the differences in prices for comparable merchandise among

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[45] *Id.*
[46] *See* SeAH's February 23, 2016 Case Brief at 14.

purchasers, regions or time periods. For those sales which are found to have prices which differ significantly, the ratio test then measures the extent of these sales, by value, throughout all of the respondent's U.S. sales to determine whether the "pattern" requirement provided under section 777A(d)(1)(B)(i) of the Act for investigations has been met. This in no way represents an attempt to predict current or future behavior by SeAH, which itself will be examined if requested in subsequent administrative reviews.

Assuming *arguendo* that the Department's analysis was based on sampled data, SeAH's cited "critical assumptions" of normal distributions and homoscedasticity are only ideal assumptions which are never present in reality.[47] Certainly a researcher designs their study to approach these ideals or any assumptions which are made in their analysis, but these are not requirements which must be met for the study to be valid. Furthermore, Cohen's descriptions of the practical significance of his small, medium and large thresholds[48] only includes these assumptions when calculating the proportion of overlap of the two individual samples.[49] Despite SeAH's lengthy discussion of the overlap of the two data samples, the Department has not relied upon these particular statistics regarding the proportion of overlap in supporting its analysis and use of these thresholds, which "have been widely adopted,"[50] but rather on the practical descriptions provided by Dr. Cohen.[51] Beyond the fact, as recognized by Dr. Cohen, that this concept may be "intuitively compelling and meaningful," this is not part of the Department's approach.

SeAH additionally attempts to impugn the Department's reliance on Cohen's thresholds and the Department's non-analysis of the data's normality. Cohen's examples of real-life, practical examples of situations which exhibit a "large" difference "is represented by the mean IQ difference estimated between holders of the Ph.D. degree and typical college freshmen, or between college graduates and persons with only a 50-50 chance of passing an academic high school curriculum. These seem like grossly perceptible and therefore large differences, as does the mean difference in height between 13- and 18-year-old girls…"[52] In other words, Cohen was stating that it is obvious on its face that there is differences in intelligence between highly educated individuals and struggling high school students, and between the height of younger and older teenage girls. SeAH argues that the definition of IQ has been developed where scores are normally distributed about a mean of 100, and that the height of individuals reasonably follows a normal distribution, therefore Cohen's analysis by inference included normal distributions.[53] However, Cohen never claimed that his inclusion of these obvious and largely disparate sample groups exhibited normal distribution of the underlying data, but rather he based his conclusions

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[47] *See* SeAH's February 23, 2016 Case Brief at 19-29.

[48] *See* Cohen, Jacob, *Statistical Power Analysis for the Behavioral Sciences*, Second Edition (1988) (Cohen) at 24-27; included in Memorandum to the File, "Reference Sources for Differential Pricing" (February 11, 2016) at Attachment 1.

[49] *See* Cohen at 21 ("2.2.1 **d** AS A PERCENT NONOVERLAP: THE **U** MEASURES. *If* we maintain the assumption that the populations being compared are normal and with equal variability (*i.e.,* homoscedasticity), and conceive them further as equally numerous, it is possible to define measures of nonoverlap (**U**) associated with **d** which are intuitively compelling and meaningful." (emphasis added))

[50] *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 (IDM) at 25; quoting David Lane et al., Chapter 19 "Effect Size," Section 2 "Difference Between Two Means."

[51] *See* Cohen at 24-27.

[52] *See* Cohen at 27.

[53] *See* SeAH's February 23, 2016 Case Brief at 17, footnotes 27 and 28.

on the fact that these differences, alone, "seem like grossly perceptible and therefore large differences," to which any reasonable person would agree. Accordingly, SeAH's argument is misplaced.

Lastly, SeAH provides an analysis based on the SAS PROC UNIVARIATE to demonstrate that its U.S. sale prices did not follow a normal distribution.[54] As discussed above, the Department does not find that the type of data distribution is relevant to its calculation of Cohen's *d* coefficients as part of a differential pricing analysis. Consequently, SeAH's analysis of its own U.S. sales data to evaluate its distribution is equally without merit.

3a. Dr. Cohen's "Small," "Medium" and "Large" Thresholds Are Arbitrary and Cannot Be Applied as Bright-Line Tests

The Department disagrees with SeAH's assertion that the three thresholds established by Dr. Cohen are arbitrary and impermissible in its analysis. As noted above, the Department's examination of the two statutory requirements under section 777A(d)(1)(B) of the Act is by necessity a gap-filling exercise. The Department must exercise its discretion in order to fill such gaps in a reasonable and logical manner. Otherwise, the Department would be unable to execute its obligation to administer the statute.

In the final results of the administrative review of *Shrimp from Vietnam*, the Department stated:

> The Department disagrees with VASEP's claim that the Cohen's *d* test's thresholds of "small," "medium," and "large" are arbitrary, and that consequently the Department should use a higher threshold for the Cohen's *d* coefficient in order to find that the sales of the test group pass the Cohen's *d* test. In his text *Statistical Power Analysis for the Behavioral Sciences*, Dr. Cohen himself describes these three cut-offs. The effect size at the small threshold "is the order of magnitude of the difference in mean IQ between twins and non-twins, the latter being the larger. It is also approximately the size of the difference in mean height between 15- and 16-year-old girls." For the medium threshold, the "effect size is conceived as one large enough to be visible to the naked eye. That is, in the course of normal experience, one would become aware of an average difference in IQ between clerical and semiskilled workers or between members of professional and managerial occupational groups" or "the magnitude of the difference in height between 14- and 18-year-old girls." For the large threshold, the difference "is represented by the mean IQ difference estimated between holders of the Ph.D. degree and typical college freshmen, or between college graduates and persons with only a 50-50 chance of passing an academic high school curriculum. These seem like grossly perceptible and therefore large differences, as does the mean difference in height between 13- and 18-year-old girls…"[55]

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[54] *See* SeAH's February 23, 2016 Case Brief at 29-30.
[55] *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review*, 20132014, 80 FR 55328 (September 15, 2015); quoting from Cohen, Jacob, *Statistical Power Analysis for the Behavioral Sciences*, Lawrence Erlbaum Associates, Publishers (1988), at 27 (citations

Although these descriptions by Dr. Cohen are qualitative in nature, they are not arbitrary but represent real world observations. As noted above from Webster's dictionary,[56] "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 "prices that differ significantly" connotes different prices where the difference 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. Certainly the examples for both Dr. Cohen's medium and large thresholds for effect size reasonably meet this level of difference. But as the Department noted in its PDM, the Department used the large threshold because "the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups…"[57] 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.

In the final determination of *Xanthan Gum from the PRC*, the Department recognized:

> In "Difference Between Two Means," the author states that "there is no objective answer" to the question of what constitutes a large effect. Although Deosen focuses on this excerpt for the proposition that the "guidelines are somewhat arbitrary," the author also notes that the guidelines suggested by Cohen as to what constitutes a small effect size, medium effect size, and large effect size "have been widely adopted." The author further explains that Cohen's *d* is a "commonly used measure" to "consider the difference between means in standardized units."[58]

Therefore, the Department continues to find that three thresholds established by Dr. Cohen have a substantive foundation in the real world and have engendered wide acceptance in the academic community. Accordingly, the Department also continues to find that their use as part of the Cohen's *d* test is appropriate.

3b. The Department Has Offered No Justification for the 33- and 66-Percent Thresholds

The Department disagrees with SeAH's assertion that the three thresholds established by Dr. Cohen are arbitrary and impermissible in its analysis. In fact, the use of these thresholds is reasonable and was recently affirmed by the CIT in *United States Steel Corporation et. al., v. United States*, Slip Op. 16-004 (CIT May 5, 2016) at 18-19 (*United States Steel*).

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omitted).
[56] *See* Webster's Ninth New Collegiate Dictionary (1989), p. 1096.
[57] *See* PDM at 5.
[58] *See Xanthan Gum from the PRC* IDM at Comment 3 (internal citations omitted); quoting from David Lane, et al., Chapter 19 "Effect Size," Section 2 "Difference Between Two Means."

Neither the statute nor the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA) provides any guidance in determining whether the requirements of sections 777A(d)(1)(B)(i) and (ii) of the Act are satisfied and, if satisfied, how to apply the average-to-transaction method. Accordingly, the Department has reasonably created a framework to determine how the average-to-transaction method may be considered as an alternative to the standard average-to-average method based on the extent of the pattern of prices that differ significantly as identified by the Cohen's *d* and ratio tests.

When 66 percent or more of the value of a respondent's U.S. sales are found to establish a pattern of prices that differ significantly, then the Department finds that the extent of these price differences throughout the pricing behavior of the respondent does not permit the segregation of this pricing behavior which constitutes the identified pattern of prices that differ significantly from that which does not. Accordingly, the Department determines that considering the application of the average-to-transaction 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 average-to-transaction 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 average-to-average 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 average-to-transaction method as an alternative comparison method to this limited portion of a respondent's U.S. sales.

As the Court recently held in *United States Steel*, the above "rationale for adopting such thresholds is reasonably explained," and it "is inherent in the concept of a threshold that observations that fall on the margins of either side will be treated disparately from those on the other side."[59] The CIT held that if it can be discerned "from Commerce's explanation that Commerce has developed its ratio test to identify the existence and extent to which there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions or periods of time," then the use of the 33- and 66- percent test is legally permissible.[60] In this case, as we have in many investigations and administrative reviews before, we have explained our ratio test and revealed the existence of a pattern of export prices. Accordingly, we disagree with SeAH's arguments in this regard.

Furthermore, we disagree with SeAH's general allegation that the Department was required to conduct a notice-and-comment rulemaking procedure in order to include these thresholds in a differential pricing analysis, and the CIT recently affirmed the Department's position on this issue in *Apex Frozen Foods*.[61]

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[59] *See United States Steel* at 18.
[60] *Id.* at 19.
[61] *See Apex Frozen Foods* at 17-22.

Lastly, we note that these thresholds, as with the approach incorporated in the differential pricing analysis itself, may be modified given factual information and argument on the record of a proceeding.[62] However, in this case, we have determined that no such modification is necessary.

4. The Department Fails to Explain Why the Pattern of Prices That Differ Significantly Were Not, or Could Not Be, Taken Into Account Using an Average-to-Average Method

The Department disagrees with SeAH's assertion that it has not provided an adequate explanation why the average-to-average method cannot account for such differences. The Department agrees with SeAH's claim that "the mere existence of different results is plainly insufficient, by itself, to satisfy the {explanation requirement}."[63] As explained in the *Preliminary Results*, if the difference in the weighted-average dumping margins calculated using the average-to-average method and an appropriate alternative comparison method is meaningful, then this demonstrates that the average-to-average 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.[64]

For SeAH in these final results, the Department finds that the weighted-average dumping margins calculated using the average-to-average method and the average-to-transaction method applied to all of SeAH's U.S. sales are 0.00 percent and 2.58 percent, respectively. Thus, the results of these calculations SeAH's calculated results move across the *de minimis* threshold, which the Department reasonable finds as a meaningful difference such that the average-to-average method cannot account for SeAH's pricing behavior in the U.S. market. The CIT has affirmed the Department's use of the "meaningful difference" test to find that the average-to-average method cannot account for such differences.[65]

The Department also disagrees with SeAH's claim that there is "no reason to believe that the price differences that give rise to a finding of 'targeted dumping' would be the cause of the

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[62] *See* PDM at 6 ("Interested parties may present arguments and justifications in relation to the above-described differential pricing approach used in this preliminary results, including arguments for modifying the group definitions used in this proceeding.").

[63] *See* SeAH's February 23, 2016 Case Brief at 36.

[64] *See* PDM at pages 3-6. *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) and the accompanying Issues and Decision Memorandum at Comment 2.

[65] *See Apex Frozen Foods* at 38-45; *see generally Samsung Electronics Co. v. United States,* Slip Op. 15-158 (CIT June 12, 2015) (although Samsung involves the Department's earlier target dumping analysis rather than a differential pricing analysis, the question here is the same – whether the explanation requirement has been met. Further, *Samsung* not only affirmed the situation when the weighted-average dumping margin moves across the *de minimis* threshold, but also when there is a relative change in the weighted-average dumping margins of at least 25 percent as being "meaningful" and thus both thresholds provide an explanation which satisfies section 777A(d)(1)(B)(ii) of the Act (*Samsung* also involves an investigation where the two statutory requirements are mandatory)).

different results from the different comparison methodologies."[66] "Targeted dumping" is defined in the SAA as a situation where "an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."[67] Concern about "targeted dumping" arose out of the Department change in practice to using the average-to-average method from the average-to-transaction method in investigations with the implementation of the Uruguay Round Agreements Act (URAA). As a result, section 777A(d)(1)(B) of the Act was enacted to provide the Department with a tool to address "targeted dumping" by permitting the application of the average-to-transaction method. Thus, the SAA acknowledged the following:

> New section 777A(d)(1)(B) provides for {the average-to-transaction method} 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 period, *i.e.*, where targeted dumping *may* be occurring.[68]

Thus, Congress provided the Department with a tool to address "targeted" or masked dumping, which it defined as dumped prices being offset by higher prices. Although section 777A(d)(1)(B)(i) of the Act requires the Department to identify a pattern of prices that differ significantly among purchasers, regions and time periods, Congress recognized that this may not be the only instances where "targeted dumping may be occurring." Thus, the purpose to applying the alternative, average-to-transaction method is to unmask "targeted dumping,"[69] which may exist within the subset of U.S. sales which constitute a pattern of prices that differ significantly or within the subset of U.S. sales which do not constitute a pattern of prices that differ significantly. If the unmasked "targeted dumping" distorts the calculated results based on the average-to-average method, then the Department considers, pursuant with 19 CFR 351.414(c)(1), that the average-to-average method is not appropriate.

To consider the extent of the masking under the average-to-average method as opposed to an alternative comparison method based on the average-to-transaction method, the Department uses a "meaningful difference" test where it compares the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using the appropriate alternative comparison method. A meaningful difference in these two results is caused by higher U.S. prices offsetting lower U.S. prices where the dumping, which may be found on lower priced U.S. sales, is hidden or masked by higher U.S. prices, such that the average-to-average method would be unable to account for such differences. Such masking or offsetting of lower prices with higher prices may occur implicitly within the averaging groups or explicitly when aggregating the average-to-average comparison results.

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[66] *See* SeAH's February 23, 2016 Case Brief at 36.
[67] *See* SAA at 842.
[68] *See* SAA at 843 (emphasis added).
[69] *See U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1363 (Fed. Cir. 2010) (*U.S. Steel*) ("… the exception contained in §1677f-1(d)(1)(B) indicates that Congress gave Commerce a tool for combating targeted or masked dumping by allowing Commerce to compare weighted average normal value to individual transaction values when there is a pattern of prices that differs significantly among purchasers, regions, or periods of time. Commerce has indicated that it likely intends to continue its zeroing methodology in those situations, thus alleviating concerns of targeted or masked dumping. That threat has been one of the most consistent rationales for Commerce's zeroing methodology in the past." (citations omitted)).

Therefore, in order to understand the impact of the unmasked "targeted dumping," the Department finds that the comparison of each of the calculated weighted-average dumping margins using the standard and alternative comparison methodologies exactly quantifies the extent of the unmasked "targeted dumping."

The simple comparison of the two calculated results belies all of the complexities in calculating and aggregating individual dumping margins (*i.e.*, individual results from comparing export prices, or constructed export prices, with normal values). It is the interaction of these many comparisons of export prices or constructed export prices with normal values, and the aggregation of these comparison results which determine whether there is a meaningful difference in these two calculated weighted-average dumping margins. When using the average-to-average method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by higher-priced U.S. sales. Again, this is reflected in the SAA which states that "targeted dumping" is a situation where "an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."[70] The comparison of a weighted-average dumping margin based on comparisons of weighted-average U.S. prices that also reflects offsets for non-dumped sales, with a weighted-average dumping margin based on comparisons of individual U.S. prices without such offsets (*i.e.*, with zeroing) precisely examines the impact on the amount of dumping which is hidden or masked by the average-to-average method. Both the weighted-average U.S. price and the individual U.S. prices are compared to a normal value that is independent from the type of U.S. price used for comparison, and this normal value will be constant because the characteristics of the individual U.S. sales[71] remain constant whether weighted-average U.S. prices or individual U.S. prices are used in the analysis.[72]

Consider the simple situation where there is a single, weighted-average U.S. price, and this average is made up of a number of individual U.S. sales which exhibit different prices, and the two comparison methods under consideration are the average-to-average method with offsets (*i.e.*, without zeroing) and the average-to-transaction method with zeroing.[73] The normal value used to calculate a weighted-average dumping margin for these sales may fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

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

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[70] *See* SAA at 842.

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

[72] *Compare* the calculated normal values in Attachment "Listing – SeAH Final Margin Program.lst " (Margin Output) of the Memorandum to the File "Antidumping Duty Administrative Review of Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea; Final Results Margin Calculation for SeAH Steel Corporation ," dated July 11, 2016 (Final Calculation Memorandum). The bases for calculating normal values for each U.S. sale within an averaging group are the same regardless of which comparison method was used.

[73] The calculated results using the average-to-average method with offsets (*i.e.*, no zeroing) and the calculated results using the average-to-transaction method with offsets (*i.e.*, no zeroing) will be identical. *See* page 117-119 of the Margin Output where the calculation results of the average-to-average method and each of the alternative comparison methods are summarized. The sum of the "Positive Comparison Results" and the "Negative Comparison Results" for each of the three comparison methods (*i.e.*, the average-to-average method, the "mixed" method, and the average-to-transaction method, are identical, *i.e.*, with offsets for all non-dumped sales (*i.e.*, negative comparison results), the amount of dumping is identical. As such, the difference between the calculated results of these comparison methods is whether negative comparison results are used as offsets or set to zero.

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 lowest U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;[74]

4) the normal value is nominally less than the highest U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;

5) the 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 weighted-average dumping margins calculated using offsets or zeroing and there is no meaningful difference in the calculated results. Under scenario (3), there is a minimal (*i.e.*, *de minimis*) amount of dumping, such that the application of offsets will result in a zero or *de minimis* amount of dumping (*i.e.*, the average-to-average method with offsets and the average-to-transaction method with zeroing both results in a weighted-average dumping margin which is either zero or *de minimis*) and which also does not constitute a meaningful difference. Under scenario (4), there is a significant (*i.e.*, non-*de minimis*) amount of dumping with only a minimal amount of non-dumped sales, such that the application of the offsets for non-dumped sales does not change the calculated results by more than 25 percent, and again there is not a meaningful difference in the weighted-average dumping margins calculated using offsets or zeroing. 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, as there are both dumped and non-dumped sales. Under scenario (3), there is only a *de minimis* amount of dumping such that the extent of available offsets will only make this *de minimis* amount of dumping even smaller and have no impact on the outcome. Under scenario (4), there exists an above-*de minimis* amount of dumping, and the offsets are not sufficient to meaningfully change the results. Only with scenario (5) is there an above-*de minimis* amount of dumping with a sufficient amount of offsets such that the weighted-average dumping margin will be meaningfully different under the average-to-transaction method with zeroing as compared to the average-to-transaction / average-to-average method with offsets. This difference in the calculated results is meaningful in that a non-de minimis amount of dumping is now masked or hidden to the extent where the dumping is found to be zero or

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

de minimis or to have decreased by 25 percent of the amount of the dumping with the applied offsets.

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

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

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

With respect to SeAH's acclamation that the "{d}ifferences in dumping margins generated by the application of 'zeroing' are not the same differences in dumping margins caused by patterns of price differences by customer, region, or time period,"[75] we disagree. Indeed, the masking of SeAH's dumping is such that the average-to-average method showed no amount of dumping at all. By contrast, the average-to-transaction method reveals above *de minimis* dumping.[76] If the

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[75] *See* SeAH's February 23, 2016 Case Brief at 36.
[76] To the extent that SeAH is alleging that the Department should not be applying zeroing it its average-to-transaction comparisons, because it "creates" the meaningful difference in the first place, the CIT in Apex Frozen

average-to-average method had been the basis for these final results of review, then masking would have resulted in no antidumping duties being assessed for SeAH for its pricing behavior in the U.S. market, which was found by the International Trade Commission to be causing material injury to the domestic industry. In this situation, Congress's intent of addressing "targeted dumping," when the requirements of section 777A(d)(1)(B) of the Act are satisfied,[77] would be thwarted with regard to SeAH if the average-to-average method were applied. It is for this reason that the Department finds that the average-to-average method cannot take into account the pattern of prices that differ significantly for SeAH, *i.e.*, the conditions where "targeted" or masked dumping "may be occurring." Thus, it is for this reason that the Department continues to find that application of the average-to-transaction method is appropriate for SeAH in these final results.

5. The Department is not Permitted to Utilize an Average-to-Transaction Method for SeAH's U.S. Sales

For the final results, the Department's analysis established that there is a pattern of U.S. prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time in SeAH's U.S. sales. Based on the results of the differential pricing analysis, the Department find that 91.78 percent (*i.e.*, over 66 percent) of SeAH's U.S. sales pass the Cohen's *d* test, which confirms the existence of a pattern of CEPs for comparable merchandise that differ significantly among purchasers, regions, or time periods, and supports the consideration of an alternative to the average-to-average method for all sales. Further, the Department determines that the average-to-average method cannot appropriately account for such difference because there is a meaningful difference in the weighted-average dumping margins calculated using the average-to-average method and an alternative method based on the average-to-transaction method applied to all U.S. sales. Specifically, the Department determines that the average-to-average method cannot appropriately account for such differences because the resulting weighted-average dumping margin moves across the *de minimis* threshold. Accordingly, the Department determines to use the average-to-transaction method for all U.S. sales to calculate the weighted-average dumping margin for SeAH.

6. The WTO Has Limited the Application of the Average-to-Transaction Method to Only the "Pattern" Sales

SeAH is incorrect that the Department cannot apply the average-to-transaction method to all U.S. sales because of an inferred requirement imposed by the WTO Antidumping Agreement or the conclusions of WTO dispute panel reports. The Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the

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

[77] *See* SAA at 842-843.

specified statutory scheme" established in the URAA.[78] In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.[79] 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.[80]

With regard to the average-to-transaction method, specifically, as an alternative comparison method under the second sentence of Article 2.4.2 of the WTO Antidumping Agreement, the Department has issued no new determination and the United States has adopted no change to its practice pursuant to the statutory requirements of sections 123 or 129 of the Uruguay Round Agreements Act.

Conclusion

Accordingly, for all of the reasons provided above, the Department has concluded that the application of its differential pricing method is appropriate in this administrative review.
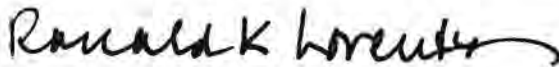
Recommendation

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

✓
_____
Agree

_____
Disagree

Ronald K Lorentzen
_____
Ronald K. Lorentzen
Acting Assistant Secretary
 for Enforcement and Compliance

July 11, 2016
_____
(Date)

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[78] *See Corus Staal BV v. U.S. Dep't of Commerce*, 395 F 3d. 1343, 1347-49 (Fed. Cir. 2005), *cert. denied* 126 S. Ct. 1023 (2006); *accord Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).
[79] *See, e.g.*, 19 U.S.C. § 3533, 3538 (sections 123 and 129 of the URAA).
[80] *See, e.g.*, 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary).