




A-580-868
AR: 02/01/2014-1/31/2015
Public Document
AD/CVDOpsII: DJG

DATE: September 6, 2016

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

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

I. SUMMARY

We analyzed the case and rebuttal briefs of interested parties in the 2014-2015 administrative review of the antidumping duty order on large residential washers (LRWs) from the Republic of Korea (Korea). The review covers one producer/exporter of the subject merchandise: LG Electronics, Inc. (LGE). 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. Subassembly Import Value in Assessment Rate

II. BACKGROUND

On March 11, 2016, the Department of Commerce (the Department) published in the Federal Register the preliminary results of the 2014-2015 administrative review of the antidumping duty



(AD) order on LRWs from Korea.¹ The period of review (POR) is February 1, 2014, through January 31, 2015.

We invited parties to comment on the Preliminary Results. In May 2016, we received timely case and rebuttal briefs from Whirlpool Corporation (the petitioner) and LGE.² On June 15, 2016, 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.

III. 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 Results, 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 identify the actual entry date. See Comment 1 below.

IV. 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, 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.

¹ See Large Residential Washers From the Republic of Korea: Preliminary Results of the Antidumping Duty Administrative Review; 2014–2015, 81 FR 12875 (March 11, 2016) (Preliminary Results), and accompanying Preliminary Decision Memorandum (PDM).

² See Whirlpool Corporation Case Brief, dated May 6, 2016 (Petitioner Case Brief); Whirlpool Corporation Rebuttal Brief, dated May 13, 2016 (Petitioner Rebuttal Brief); LGE Case Brief, dated May 6, 2016 (LGE Case Brief); LGE Rebuttal Brief, dated May 13, 2016 (LGE Rebuttal Brief).

³ See Memorandum entitled, “Large Residential Washers from Mexico: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,” dated June 15, 2016.

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.

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.

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 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

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

convenience and customs purposes, the written description of the merchandise subject to this scope is dispositive.

V. 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 date on which suspension of liquidation began, *i.e.*, August 3, 2012. 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 further notes that the Department excluded such sales in the previous review of this order.¹⁴

LGE states that it has provided the necessary information to tie most of its reported U.S. sales in this review to the entry date of the merchandise. Accordingly, LGE asserts that the Department should use this information to do what it did in the AR1 Final Results and exclude from its analysis the U.S. sales tied to entries prior to the suspension of liquidation.

The petitioner asserts that the Department's established practice is to include in the margin calculation all CEP sales regardless of entry date so long as the date of sale is within the period of review.¹⁵ The petitioner claims that this practice exists because there can be a lag between entry data and sale date for CEP sales.¹⁶ According to the petitioner, while section 751(a)(2) of the Act requires that the duty calculated apply to "each entry" of the merchandise, the statute does not specify how the duty shall be calculated. To that end, the petitioner contends

¹² See LGE Case Brief at 5-6 (citing 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 *Id.*, at 6-7 (citing 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"); and 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 *Id.*, at 6 (citing Large Residential Washers From the Republic of Korea: Final Results of the Antidumping Duty Administrative Review; 2012-2014, 80 FR 55595 (September 16, 2015) (AR1 Final Results), and accompanying Issue and Decision Memorandum at Comment 1).

¹⁵ See Petitioner Rebuttal Brief at 4-5 (citing as examples of the Department's practice Corus Staal BV v. United States, 387 F. Supp. 2d 1291, 1302-3 (Ct. Int'l Trade 2005); Carbon and Certain Alloy Steel Wire Rod From Mexico: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 28190 (May 14, 2013) and accompanying Issues and Decision Memorandum at Comment 2 ("for CEP sales made after importation . . . we instruct parties to report each transaction that has a date of sale within the POR"))).

¹⁶ *Id.*, at 5 (citing Gray Portland Cement and Clinker from Japan: Final Results of Antidumping Duty Administrative Review, 58 FR 48826 (September 20, 1993)).

that 19 CFR 351.213(e)(1)(i) allows the Department to analyze “as appropriate, entries, exports, or sales of the subject merchandise.”¹⁷ With regard to the Preamble, the petitioner notes that “on a case-by-case basis, the Department *may consider* whether the ability to link sales with entries should cause the Department to base a review on sales of merchandise entered during the period of review, rather than on sales that occurred during the period of review.”¹⁸ The petitioner contends that the ability to tie sales to entry date is not outcome determinative.¹⁹

Although the petitioner acknowledges the Department’s determination to exclude pre-order sales in the AR1 Final Results, the petitioner refers to the Department’s statement that this exclusion was “a phenomenon of the first administrative review of an AD order.”²⁰ The petitioner argues that the Department has only excluded sales in the first administrative review when a respondent can tie those sales to entry date before the imposition of provisional measures.²¹ The petitioner contends that to continue this treatment in subsequent reviews would permit respondents to dump with impunity previously stockpiled subject merchandise. Rather, the Department should rely on its practice of calculating a dumping margin based on all sales, rather than entries, in CEP situations such as the instant one because “dumping on sales made during the review period is representative of dumping on entries made during the review period.”²² The petitioner concludes by arguing that should the Department decide to exclude LGE’s sales that entered prior to the imposition of provisional measures, it should do so only where LGE has linked its sales to entries based on serial number, which is what the Department did in the AR1 Final Results.²³

The Department’s Position:

Consistent with our decision in the AR 1 Final Results, 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.²⁴ As in the prior review, 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 AD duties. Such merchandise is not subject to those duties and should be excluded from the margin calculation.²⁵

¹⁷ Id. (citing in support Allegheny Ludlum Corp. v. United States, 346 F.3d 1368, 1373 (Fed. Cir. 2003) (holding that section 751(a)(2) of the Act does not indicate how Commerce should calculate the dumping margin).

¹⁸ Id., at 5-6 (citing Preamble, 62 FR at 27314-15 (emphasis added by the petitioner)).

¹⁹ Id., at 6 (citing Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Antidumping Administrative Review, 66 FR 18747 (April 11, 2001), and accompanying Issues and Decision Memorandum at Comment 2).

²⁰ Id., at 7 (citing AR1 Final Results at Comment 1).

²¹ Id., at 7-8 (citing e.g., High-Tenacity Rayon Filament Yarn, Preliminary Results of Antidumping Duty Administrative Review, 59 FR 32181 (June 22, 1994) (unchanged in High-Tenacity Rayon Filament Yarn from Germany; Final Results of Antidumping Duty Administrative Review, 60 FR 15897 (March 28, 1995)); Wire Rod from France, 61 FR at 47874).

²² Id., at 9 (citing NSK Ltd. v. United States, 17 CIT 590, 595 (1993)).

²³ Id., at 9-10 (citing AR1 Final Results at Comment 1).

²⁴ See AR1 Final Results at Comment 1.

²⁵ See Preamble, 62 FR at 27314 (“{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”) (emphasis in original); see also Seamless Refined Copper Pipe and Tube From Mexico: Preliminary Results of Antidumping

While we acknowledge our declaration in the AR1 Final Results that “{t}he situation at hand is a phenomenon of the first administrative review of an AD order,” that statement was based on the assumption that, by the time of the subsequent administrative review, the inventory of merchandise imported prior to the suspension of liquidation would have been exhausted. However, LGE did not exhaust its pre-suspension inventory as LGE has identified a relatively small quantity of LRWs sold during the POR which entered the United States prior to the suspension of liquidation.²⁶ We do not find this volume of pre-suspension inventory to indicate that LGE stockpiled merchandise prior to suspension of liquidation, as the petitioner speculatively suggests.

LGE reported at pages C-43 – C-45 of its June 5, 2015, 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 4 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.

LGE also stated in the QRC that, for most of the POR, 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. LGE states that, as of September 16, 2014, it had the ability to match specific sales to entry dates for this channel as it did for the other channels. However, based on the information reported in the QRC, we are unable to determine whether LGE was able to identify the actual entry date for the Channel 2 sales where it reported the entry date as prior to the date of suspension of liquidation. Therefore, we did not exclude any Channel 2 sales with reported entry dates prior to August 3, 2012.

Duty Administrative Review; 2010-2011, 77 FR 73422 (December 10, 2012) (Copper Pipe from Mexico), and accompanying Preliminary 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)); Wire Rod from France, 61 FR at 47875 (“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”).

²⁶ See Memorandum to the File entitled “Final Results Margin Calculation for LGE,” dated concurrently with this memorandum, at Attachment 2, SAS Margin Calculation Program Log at page 16 (SAS log entry indicating the number of sales transactions affected relative to the total number of sales transactions examined during the POR) and at Attachment 2, SAS Margin Calculation Program Output at pages 5-8 (SAS output sample of sales transactions entered prior to suspension of liquidation).

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 under a 19 CFR 351.225(k)(1) analysis, and therefore, should be excluded from the margin calculation. According to LGE, the scope specifically applies to LRWs, 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.²⁷ 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. LGE adds that it is evident from the ITC Report that the merchandise subject to the scope was not intended to cover defective merchandise because the purpose of the washers, as found by the ITC, are to replace aging or broken equipment.

Additionally, LGE states that its defective merchandise is outside the scope of the order, as it fails to satisfy the 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.²⁸ 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 cites examples of LRW service documentation it submitted to support its position that the defective merchandise sales exhibited explicit functional defects that prevented the units from functioning as LRWs and, therefore, these units have different physical characteristics from non-defective LRWs.²⁹ With respect to sales of scrapped LRWs, LGE asserts that the issue is even clearer, as such units can only be harvested for parts or recycled, and can in no way be repaired to function as a washing machine. LGE also states that the channels of trade and the terms or conditions of sale for defective merchandise are distinct from non-defective merchandise – LGE’s defective merchandise is sold only to specialized liquidators and not to LGE’s normal wholesale, retail, or distributor customers, and it is sold without LGE warranties.

While LGE acknowledges the Department’s rejection of LGE’s position concerning defective sales in the previous review, LGE contends that determination was flawed. According to LGE, the Department based its decision that LGE’s sales of defective units are included in the scope of the order because those units are capable of functioning as residential washers (*i.e.*, capable of washing clothes in a household) when sold to the ultimate purchaser (*i.e.*, the liquidator’s customer).³⁰ However, LGE maintains that such an analysis is irrelevant for purposes of calculating LGE’s margin because the defective sales in question are LGE’s sales to the

²⁷ See LGE Case Brief at 8-14 (citing Certain Large Residential Washers from Korea and Mexico, USITC Pub. No. 4378 (February 2013) (ITC Report) (excerpts included in this record at Exhibit C-3f of the QRC) to support its contention that the petitioners did not intend to include imports of defective merchandise in the scope); and Large Residential Washers From Mexico and the Republic of Korea: Antidumping Duty Orders, 78 FR 11148 (February 15, 2013) (Order)).

²⁸ See LGE Case Brief at 14-28.

²⁹ See QRC Exhibits C-3k – C-3o.

³⁰ See LGE Case Brief at 26 (citing AR1 Final Results at Comment 2).

liquidator, and the units involved in those transactions are, at that point, incapable of meeting the expectations of the ultimate purchasers that the machines wash clothes in a household.

The petitioner responds that the Department properly rejected LGE's arguments that the defective merchandise in question is outside the scope of the order in the AR1 Final Results³¹ and should continue to do so in this review. As it asserted in the AR1 Final Results, the petitioner maintains that the damaged and defective merchandise described by LGE is unambiguously in-scope merchandise because it meets the physical specifications provided in the scope, and there is no specific scope exclusion for damaged or defective washers. The petitioner contends that LGE bases its objection to the Department's AR1 Final Results in part by claiming that the Department analyzed the wrong level of trade, but such a distinction is irrelevant. According to the petitioner's analysis, the washers LGE classified as "defective" were functioning residential washers and fall within the scope of the order.³² Additionally, the petitioner contends that the defective washers at issue overlap substantially with non-defective washers under the Diversified Products scope criteria.³³

The Department's Position:

In the previous review, we found that:

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.... 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.³⁴

LGE offers no compelling basis for us to reconsider this determination. The only new argument LGE presents in this review is that the AR1 Final Results analysis was faulty because, with respect to whether the unit is capable of functioning as a residential washer, we considered the unit as sold to the ultimate purchaser (i.e., LGE's customer's customer), after LGE's customer refurbished the unit. LGE's argument appears to be that, at the time of LGE's sale to its customer, the LRW is incapable of functioning as a washer and thus falls outside the scope of the order. However, nothing in the scope language specifies that the Department must consider the expectations of the intermediate purchaser (i.e., the liquidator/refurbisher) at the time of that sale, rather than the expectations of the ultimate purchaser. In addition, we note that the scope language does not exclude LRWs that meet the physical characteristics criteria and are sold as scrap. Therefore, we continue to find that LGE's defective LRWs meet the physical description

³¹ See Petitioner Rebuttal Brief at 12-13 (citing AR1 Final Results at Comment 2).

³² Id., at 16-18, which includes cites to proprietary information on the record concerning LGE's resales of non-prime merchandise.

³³ Id., at pages 18-21.

³⁴ See AR1 Final Results at Comment 2.

of in-scope merchandise, and do not meet the requirements set forth in the limited exclusions described in the scope language, and thus are within the scope of the Order.

Comment 3: Exclusion of Potentially Double-Counted U.S. Sales

In the Preliminary Results, we excluded from our margin analysis certain sales of non-prime (defective) LRWs for which LGE was able to tie by unit serial number to a previous sale of that unit reported in the U.S. sales database of prime merchandise in this POR, or in the previous POR.³⁵

LGE argues that 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 category, the company identified the original sale in its non-defective “goodset” database, or in the goodset sales reported in the previous review period, and also identified the subsequent re-sale of that unit in the defective sales database reported for this review period. For these sales, the exchange of a defective unit is made through LGE’s affiliated aftermarket service company LGE Alabama, Inc. (LGEAI) directly with the end user, such that LGE’s retailer customer is not part of the exchange and, therefore, LGE never credits the original sale of the unit to the retailer customer nor cancels the sale in its regular U.S. sales file.³⁶ Accordingly, LGE contends that the Department should use the information LGE provided for the record to exclude the re-sales of defective merchandise for which LGE identified the original “goodset” sale of that unit.³⁷ LGE states that, although the Department agreed that this type of sale presented a “double-counting problem,” it did not exclude these sales in the AR1 Final Results because the Department did not believe LGE adequately tied the re-sold units to its original sale after entry. However, LGE asserts that, in this review, it has adequately linked the re-sale of the defective LRW to the original sale by serial number of the LRW.

The petitioner acknowledges that LGE’s sales listings include two reported sales of exactly the same damaged LRW unit, namely (a) the original sale of the defective LRW {sic} in the non-defective “goodset” database, and (b) the subsequent resale of that unit in the defective sales database. However, the petitioner argues that the Department incorrectly excluded the latter transaction from the margin calculation and thus did not carry out the statutory requirement to “determine the normal value and export price (or constructed export price) of each entry of the subject merchandise...and the dumping margin for each such entry.”³⁸ According to the petitioner, the resale of the defective unit should be included because LGE failed to account for the unit sold to replace the original sale, or because the original sale should be considered cancelled through the provision of a replacement LRW, leaving the transaction in the defective sales database to be considered. In other words, the petitioner contends that there are two LRWs that entered the United States that are sold to two different customers for purchase and use by two different end-users (i.e., the damaged and replacement LRWs). In its rebuttal brief, the

³⁵ See PDM at page 8, which cited the QRC at Exhibit C-3a, and LGE’s response to the Department’s first supplemental questionnaire for Sections A, B and C, dated October 16, 2015 (SQR1) at pages 12-13 and Exhibits FS C-2 and FS C-3.

³⁶ See SQR1 at Exhibit FS C-3a.

³⁷ The LGE Case Brief does not address the Department’s preliminary results and the Department’s methodology for excluding sales.

³⁸ See Petitioner Case Brief at 5 (citing section 751(a)(2) of the Act).

petitioner reiterates its argument and asserts that there is no double-counting because there are two units at issue and that section 751(a)(2)(A) of the Act requires the Department to calculate the margin based on both entries, as explained in its case brief.

LGE responds in its rebuttal brief that the petitioner incorrectly consolidates the legal requirement to assess antidumping duties for each import of subject merchandise that entered during the review period with the particular methodology that the Department uses to calculate the rate for assessing antidumping duties. LGE contends that the Department's methodology in this review and in the previous review to calculate the rate on the basis of sales, rather than entries, made during the POR is consistent with 19 CFR.351.213(e)(1)(i). LGE points to the Preamble as evincing the Department's discretion to take a case-by-case approach in this regard.³⁹ LGE adds that the Department's discretion in this regard has been judicially affirmed.⁴⁰ LGE further disputes the petitioner's assumption that, with respect to sales of defective units, there are two sales of two washers. Rather, LGE asserts that it is one unit that is sold twice, as the replacement LRW LGE supplies is not sold but provided free of charge, without any exchange of consideration, under LGE's warranty. Accordingly, LGE maintains there is no second sale to account for, as the petitioner suggests. Finally, LGE rejects the petitioner's argument that the Department should use the resale of the defective merchandise in its calculation instead of the original sale transaction, as that approach is contrary to the statutory requirement in section 772(b) of the Act to determine CEP based on the first sale in the United States.

The Department's Position:

For the final results, we continue to exclude from our margin analysis those sales of non-prime LRWs for which LGE was able to link by unit serial number to a previous sale of that unit reported in the U.S. sales database of prime merchandise in this POR, or in the previous POR. With respect to the petitioner's argument that there is no double-counting of sales because there are two units at issue, we disagree. We agree instead with LGE that, based on record evidence, in these specific instances, it is the same unit sold twice. The petitioner's argument relies on the assumption that most, if not all, of the transactions reported in the defective sales database represent the sale of two unique LRWs. If an LRW is purchased by an end-user and later found to be defective, that LRW (Unit1) is re-sold to LGE's liquidator-customer, and the end-user receives a replacement LRW (Unit 2). Thus for each LRW sale in the defective sales database, the petitioner assumes there must be a corresponding sale or entry of a non-defective LRW to replace the end-user's originally-purchased LRW. For purposes of identifying whether a transaction is double-counted in our margin analysis, the petitioner's assumption is misplaced. LGE provided sufficient evidence for this record to demonstrate that it reported the sale of the same LRW unit in two databases.⁴¹ Therefore, we properly excluded one of these reported sales from our margin analysis.

³⁹ See LGE Rebuttal Brief at 3 (citing Preamble, 62 FR at 27314; and Corus Staal BV v. United States, 387 F. Supp. 2d 1291, 1303 (CIT 2005) (citing NSK Ltd. v. United States, 825 F. Supp. 315, 320 (CIT 1993))).

⁴⁰ Id. (citing e.g., Hynix Semiconductor, Inc. v. United States, 424 F.3d 1363, 1368-69 (Fed. Cir. 2005); and Allegheny Ludlum Corp. v. United States, 346 F.3d 1368, 1373 (Fed. Cir. 2003)).

⁴¹ See SQR1 at pages 12-13 and Exhibits FS C-2 and FS C-3.

We disagree with the petitioner that we should examine the second sale of the unit, the sale to the liquidator/refurbisher as a defective unit, rather than the original sale. Unlike the situation discussed below under Comment 4, where the only sale on the record of the LRW unit is to the purchaser of the defective LRW, in this instance, LGE reported two sales of the same LRW unit to unaffiliated purchasers. Section 772(b) of the Act instructs the Department to examine “the price at which the subject merchandise is first sold (or agreed to be sold) in the United States” to an unaffiliated purchaser (emphasis added). The original “goodset” sale of the LRW unit is clearly the first sale of the LRW to an unaffiliated purchaser in the United States, and as such, is the proper transaction for our analysis.

The petitioner’s argument suggests that we must also account for the second LRW, the replacement LRW assumed to be provided to the original end-user, in our analysis, which, in turn, would demonstrate that there is no double-counting. The importation of this second unit represents a separate entry of subject merchandise into the United States. We find no evidence on the record to indicate that LGE did not fully report all entries of subject merchandise during the POR. Thus, we have no basis to conclude that LGE did not include the import of the second unit in its sales reporting, assuming that the end-user actually received such a replacement unit. Further, we do not need to account for the second LRW unit in order to determine whether the sale of the original LRW unit has been double-counted in LGE’s reporting in this POR. As discussed above, for the excluded re-sales, we are satisfied that LGE has linked the specific LRW unit in question to a prior entry reflected in another U.S. sales database reported to the Department.

Comment 4: 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.⁴² 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. Therefore, LGE maintains that the re-sale is not the first sale after the date of importation, as defined by the statute, and cannot be used to calculate a margin. In addition, LGE asserts that re-sales are likely to be either used or damaged, and do not reflect the commercial value of the goodset units that are the focus of any antidumping proceeding. Finally, LGE points to SSHP From Sweden in support of its contention that the Department consistently excludes re-sales from its calculations of dumping margins.⁴³

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

⁴² See LGE Case Brief at 34-37 (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 section 772(b) of the Act, which defines CEP 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”).

⁴³ See LGE Case Brief at 36 (citing to Final Determination of Sales at Less Than Fair Value: Stainless Steel Hollow Products From Sweden, 52 FR 37810 (October 9, 1987) at Comment 9 (SSHP From Sweden)).

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. If the original sale is cancelled, the petitioner maintains that the subsequent re-sale constitutes the first sale in the United States to an unaffiliated customer and must be analyzed pursuant to section 751 of the Act. If the original sale is not cancelled, the petitioner asserts that each of the two transactions must be analyzed because each transaction represents two distinct LRWs –the original LRW that was found to be defective, and the LRW supplied to the original customer to replace the defective unit. The petitioner concludes that each unit is thus tied to a transaction in which an LRW is “first sold” in the United States, consistent with the statutory definition of CEP, and excluding either sale would be contrary to law.

The Department’s Position:

LGE’s argument is unchanged from that in the AR1 Final Results and provides no basis for us to reverse our decision in that review that LGE’s sales of defective merchandise must be included in the margin calculation pursuant to section 751(a)(2)(A) and 772(b) of the Act. We concluded in the AR1 Final Results that:

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.⁴⁴

The facts underlying that determination are unchanged in this review. The sales of the defective LRWs at issue reflect the only sales of these units to unaffiliated purchasers in the United States on the record of this review. In contrast, in SSHP from Sweden, the respondent was able to tie the resales of the nonprime product made during the period of investigation to earlier sales made to unaffiliated purchasers in the United States.⁴⁵ Similarly, as discussed above under Comment 3, we are excluding LGE’s resales of defective LRWs where LGE was able to account for the original sale of the unit. Accordingly, we continue to include LGE’s sales of defective merchandise in the margin calculation, with the exception of those specific units for which the original sale as a prime LRW was previously reported, as discussed above in Comment 3.

⁴⁴ See AR1 Final Results at Comment 3.

⁴⁵ See SSHP from Sweden, 52 FR at 37810 (Comment 9) (“{Respondent}, however, first sold the products at issue in 1979 {prior to the period of the investigation} to an unrelated customer in the United States. The 1979 transaction then is the only sale that may be reviewed to determine whether dumping has taken place with respect to the resold products... therefore, the 1986 sale {i.e., transaction during the period of investigation} of this merchandise was excluded from the data base).

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(d) 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 preliminary results reflect an unreasonable analysis that do not reflect the specifics of this administrative review. Therefore, LGE asserts that the Department must make the following changes to the Cohen's *d* test:

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.⁴⁶ 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," and not merely the difference between two numbers, and also 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 term "differ" is not just about differences, but about prices that are so "unlike" and "distinct" as to be "targeted" prices. 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."⁴⁷ The differential pricing analysis also ignores the statutory term "significantly," which requires an assessment beyond what is "large", but 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.⁴⁸

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." LGE contends that the Department is trying to create the illusion of statistical validity when it is actually ignoring the entire issue of when differences are truly "significant." LGE maintains that the differences must be meaningful in the particular context and that the Department must recognize the inherent limitation of the "large" threshold, because "small," "medium," and "large"

⁴⁶ See LGE Case Brief at 40-41 (citing Chevron U.S.A. Inc. v. Natural Res. Council, 467 U.S. 837 (1984) (Chevron)).

⁴⁷ LGE claims that the definition of "pattern" in this context is "a reliable sample of traits, acts, tendencies, or other observable characteristics of a person, group, or institution." See LGE Case Brief at 45.

⁴⁸ See LGE Case Brief at 41-47.

thresholds are not defined for any substantive purpose and are arbitrary conventions.⁴⁹

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 claims that the statutory terms “differ,” “pattern,” and “significantly,” in light of the context of the AD law and the historical context of the concern about targeted dumping, limit the Department to examining lower-priced sales only. 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. LGE adds that the Department failed in the Preliminary Results to provide any reasoned explanation of why the pattern of export prices used in the Department’s previous tests has been abandoned (*i.e.*, why it changed from a one-tailed test focused on lower prices to a two-tailed test that focuses on both lower and higher prices) or how these higher prices are relevant to the existence of “hidden dumping.” Finally, LGE asserts that higher-priced sales, implicitly through the calculation of the weighted-average price, can affect the outcome is already accounted for in using the mean of the weighted-average sales prices in the Cohen’s *d* test, and one can only have “hidden dumping” when there are sales below the Cohen’s *d* threshold regardless of whether there are any sales above that threshold.⁵⁰

4. Change the differential pricing analysis by applying it separately to original equipment manufacturer (OEM) customers and non-OEM customers. LGE argues that, as its OEM customers are buying LRWs on a fundamentally different basis than non-OEM customers (*e.g.*, they do not pay for warranty coverage as they assume those costs themselves, and they are not paying for any brand premium), the OEM customers receive a different price. Accordingly, LGE maintains that the general nature of OEM versus non-OEM sales and the particular facts of this review demonstrate that the Department needs to take this commercial consideration into account when applying its differential pricing methodology.⁵¹

5. Change the differential pricing analysis to exclude the defective and scrap sales from the U.S. sales data before applying the differential pricing methodology.⁵² LGE argues that the sales of defective and scrap washers are made at very different prices from those

⁴⁹ *Id.* at 47-52.

⁵⁰ *Id.* at 52-58.

⁵¹ *Id.* at 58-61.

⁵² LGE’s argument in this regard assumes that the Department does not exclude consideration of non-prime LRWs in its margin calculation, as LGE advocates above.

of non-defective washers because they are different products for which the customers buying defective or scrap washers are not paying for any warranty coverage, and a normal-functioning washer. Further, LGE asserts that, with respect to defective washers, the selling price is significantly impacted because the customer must either refurbish the washer before it can function or harvest the defective washer for parts. As a result, LGE contends that the Department must take the commercial considerations of non-prime merchandise sales into account when applying its differential pricing methodology.⁵³

6. Change the differential pricing analysis to reflect the particular factual circumstances of this review. LGE asserts that the Department should recognize the recent World Trade Organization (WTO) Panel Report with respect to the Department's failure to account for "prevailing factual circumstances in order to consider the possibility that something other than targeted dumping is responsible for these relevant price differences."⁵⁴ In this regard, LGE maintains that the factual circumstances of OEM pricing and non-prime sales, as outlined above, warrant excluding the application of the A-T comparison method to those subsets of U.S. sales. LGE claims that this particular administrative proceeding is already subject to a specific WTO decision that will need to be implemented by the United States because the United States did not appeal this specific issue and therefore the Department should not refuse to consider these specific factual circumstances now.⁵⁵

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.⁵⁶ 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 is circular and does not meet the statutory requirement to explain why "such differences" could not be taken into account by the standard A-A method. In addition, LGE contends that the DS464 Panel Report regarding the Department's failure to account for factual circumstances in its explanation for resorting to the A-T method provides a further rationale for providing an adequate explanation. 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.⁵⁷

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 statute's relevant provisions are undefined, and, therefore, the Department possesses wide discretion under Chevron step 2 in developing a methodology intended to uncover significant differences in price among customers, regions, and/or time periods and to provide a remedy to the domestic industry when the averaging of the U.S. prices would otherwise mask significant dumping. The petitioner asserts that the Department and the courts consistently have rejected LGE's proposed

⁵³ LGE Case Brief at pages 61-63.

⁵⁴ Id. at 64 (citing Panel Report, United States – Anti-Dumping and Countervailing Duty Measures on Large Residential Washers from Korea, WT/DS464/R, issued 13 November 2015 (DS464 Panel Report)).

⁵⁵ Id. at 63-70

⁵⁶ Id. at 88-91.

⁵⁷ Id. at 66-70.

adjustments to the differential pricing methodology because of the substantial deference granted by Congress to the Department.⁵⁸ Further, the petitioner contends that the Department's Cohen's *d* test reasonably includes high- priced sales as well as low-priced sales in identifying whether a significant pattern of price differences exists because such high-priced sales can offset lower-priced sales which, in turn, can mask dumping.⁵⁹ The petitioner points out that the SAA at 843 forecloses LGE's argument on the inclusion of higher-priced sales in the Cohen's *d* analysis.

The petitioner further contends that LGE fails to cite to any specific statutory language that would support its assertion that the Department is required to find "targeting," which contemplates "intent." Although LGE cites to the SAA's reference to "targeted dumping," the petitioner claims that this citation is misplaced because the provision was enacted to address the calculation of margins in investigations, not administrative reviews.⁶⁰ The petitioner clarifies that, when the Department changed its administrative review practice in 2012, it explained that it would be relying on its practice used in investigations, but nothing in that rulemaking identified the need to remedy "targeted dumping."

With respect to LGE's arguments to exclude certain sales from the differential pricing analysis, the petitioner responds that, under Section 777A of the Act, sales of non-prime (i.e., damaged and defective) merchandise are sales of subject merchandise and thus must be examined. Whatever motivation LGE may have had for making these sales, the petitioner maintains that motive and intent do not matter when the Department is determining whether sales are differentially priced, and in any event there is no inherent bias in including these non-prime sales in identifying a pattern because they are compared to other non-prime sales. LGE's OEM sales, the petitioner continues, also must be examined because to exclude the OEM sales from the differential pricing analysis would remove all sales to the OEM customer from the analysis. The petitioner explains that these sales are made at the same level of trade as non-OEM sales, which the differential pricing methodology accounts for, and the Department is not required to account for the cause of observed price differences.⁶¹ Finally, the petitioner maintains that the Department properly explained why the A-A methodology could not take account of the pattern of prices that differed significantly and that the Court of International Trade (CIT) has upheld the Department's explanation in other cases.⁶² The petitioner concludes that WTO decisions are without effect under U.S. law without a decision to implement and there has been no WTO decision implemented with regard to a finding of differential pricing.

The Department's Position:

The Department disagrees with LGE that the differential pricing analysis, including the Cohen's *d* test, is unreasonable, unlawful, or arbitrary. To the contrary, and as explained in the Preliminary Results, the Department continues to develop its approach pursuant to its authority

⁵⁸ See Petitioner Rebuttal Brief at pages 29 – 33.

⁵⁹ *Id.* at 33-39.

⁶⁰ *Id.* at 31 (citing H.R. Rep. 826, Part 1, 103d Cong., 2d Sess. (October 3, 1994) at 99).

⁶¹ *Id.* at 39- 42.

⁶² *Id.* at 42-44 (citing Apex Frozen Foods Private Ltd. v. United States, 144 F. Supp. 3d 1308, 1325 n.19 (CIT 2016) (Apex 2016) (currently on appeal), and Apex Frozen Foods Private Ltd. v. United States, 37 F. Supp. 3d 1286, 1296 (CIT 2014) (Apex 2014)).

to address potential masked dumping.⁶³ In carrying out this statutory objective, the Department determines whether “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.... why such differences cannot be taken into account using {the A-A or transaction-to-transaction (T-T) comparison method}.”⁶⁴ With the statutory language in mind, the Department relied on the differential pricing analysis to determine whether these criteria are satisfied such that application of an alternative methodology may be appropriate.⁶⁵

LGE presents several arguments regarding the Department’s differential pricing analysis in the Preliminary Results. LGE’s arguments are premised on the idea that the Department’s reliance on the differential pricing analysis, including the Cohen’s *d* test, does not satisfy the plain language of the statute or statutory intent. We note, however, 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 T-T method cannot account for such differences. On the contrary, carrying out the purpose of the statute⁶⁶ here is a gap-filling exercise properly conducted by the Department.⁶⁷ 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 it is in no way contrary to the law.

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

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 export 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. Although the application of section 777A(d)(1) of the Act is designated for less-than-fair-value (LTFV) investigations, the Department has stated that it will apply this same framework in administrative reviews.⁶⁸ The Department’s application of the differential pricing analysis, as described in the Preliminary Results, provides a complete and reasonable interpretation of the language of the statute, regulations and SAA to identify whether the normal

⁶³ See PDM at 4-6.

⁶⁴ See section 777A(d)(1)(B) of the Act.

⁶⁵ See 19 CFR 351.414(c)(1).

⁶⁶ See *Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) (“The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as ‘masked dumping.’ By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result.” (internal citations omitted)).

⁶⁷ See *Chevron*, at 837, 842-43 (recognizing deference where a statute is ambiguous and an agency’s interpretation is reasonable); see also *Apex 2014*, 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).

⁶⁸ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101, 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 ... paralleling the WTO-consistent methodology that the Department applies in original investigations”).

A-A methodology is appropriate, and it provides a remedy for “targeted” or masked dumping⁶⁹ when the conditions exist that evince that masked dumping may be occurring.

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

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

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

(2) Reviews.--In a review under section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

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

New section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for

⁶⁹ See Nan Plastics Corp., Ltd. v. United States, 128 F. Supp. 3d 1345, 1347 n.1 (CIT 2015)(“In the international trade community, the terms ‘masked’ dumping and ‘targeted’ dumping are used interchangeably.”).

a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring.⁷⁰

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."⁷¹

With the enactment of the URAA, the Department's standard comparison method in an LTFV investigation is normally the A-A method. This standard is reiterated in the Department's regulations, which state that "the Secretary will use the A-to-A method unless the Secretary determines another method is appropriate in a particular case."⁷² As recognized in the SAA, 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 the A-A method, or the T-T method, "cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping *may* be occurring."⁷³ Neither the Act 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 or that the U.S. sales which constitute a pattern are the only sales where "targeted dumping" *may* be occurring or dumping *may* be masked. As stated in the Act, the requirements for considering whether to apply the A-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.

Accordingly, the Department finds that 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.⁷⁴ While "targeting" and "targeted dumping" may be used as a general expression to denote this provision of the statute,⁷⁵ these terms impose no additional requirements beyond those specified

⁷⁰ See Uruguay Round Agreement Act, Statement of Administrative Action (SAA), H.R. Doc. No. 103-316 at 843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4161

⁷¹ See SAA at 842.

⁷² See 19 CFR 351.414(c)(1). This approach is now also followed by the Department in administrative and new shipper reviews. 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").

⁷³ See SAA at 843 (emphasis added).

⁷⁴ See 19 CFR 351.414(c)(1).

⁷⁵ See, e.g., Samsung Electronics Co. Ltd. v. United States, 72 F. Supp. 3d 1359 at 1364 (CIT 2015) (Samsung), p. 5 ("Commerce may apply the A-to-T methodology 'if (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time, and (ii)

in the statute 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 a purpose or intent on behalf of the exporter to focus on a sub-group of its U.S. sales. The court has already found that the purpose or intent behind an exporter’s pricing behavior in the U.S. market is not relevant to the Department’s analysis of the statutory provisions of section 777A(d)(1)(B) of the Act.⁷⁶ 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.”⁷⁷

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 a 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 method, and it provides a remedy for “targeted” or masked dumping when these conditions exist.

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

the administering authority explains why such differences cannot be taken into account using’ the A-to-A or T-to-T methodologies. Id. § 1677f-1(d)(1)(B). Pricing that meets both conditions is known as ‘targeted dumping.’”).

⁷⁶ See JB F RAK LLC v. United States, 991 F. Supp. 2d 1343, 1355 (CIT 2014); aff’d JB F RAK LLC v. United States, 790 F.3d 1358 (Fed. Cir. 2015) (JB F RAK).

⁷⁷ See JB F RAK, 790 F.3d at 1368 (internal citations omitted).

When the respondent's pricing behavior exhibits conditions in which masked dumping may be a problem – i.e., where there exists a pattern of prices that differ significantly – then the Department considers whether the standard A-A method can account for “such differences” – i.e., the pattern or conditions found pursuant to the pattern requirement. To examine this second statutory requirement, the “explanation requirement,” the Department considers whether there is a meaningful difference between the weighted-average dumping margin calculated using the A-A method and that calculated using the appropriate alternative comparison method based on the A-T method. Comparison of these results indicates whether the differences in U.S. prices mask or hide dumping when normal values are compared with average U.S. prices (the A-A method) as opposed to when normal values are compared with sale-specific U.S. prices (the A-T method). When there is a meaningful difference in these results, the Department finds that the extent of masked dumping is meaningful to warrant the use of an alternative comparison method to quantify the amount of a respondent's dumping in the U.S. market, thus fulfilling the language and purpose of the statute and the SAA.

A Pattern of Prices That Differ Significantly

LGE asserts that the Department must interpret the terms “differ,” “pattern,” and “significantly” in relation to the “concept of injurious targeting,” or “targeted dumping,” in order for the Department's analysis to satisfy the statutory requirements. LGE insists that these terms somehow modify the meaning of the statutory terms 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. However, 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.

Although 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 on a finding beyond satisfaction of the two explicit statutory requirements. As discussed above, the SAA states that consideration of the A-T method, as an alternative comparison method, may respond to such concerns where the A-A method, or the T-T method, “cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, i.e., where targeted dumping *may* be occurring.”⁷⁸ Neither the Act 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 or that the U.S. sales which have been identified to constitute a pattern are the only sales where “targeted dumping” *may* be occurring or dumping *may* be masked. As stated in the Act, the requirements for considering whether to apply the A-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.

LGE argues that “pattern” must be interpreted in light of “a given situation and under particular circumstances,” and that the SAA's reliance on “targeting” and “targeted dumping” infers additional meaning to the words “pattern,” “differ,” and “significantly” beyond the normal understanding of these words in the statute. The Department disagrees. When discussing the

⁷⁸ See SAA at 843 (emphasis added).

meaning of “pattern,” LGE’s arguments are circular and present conclusions that are not logically supported by the record evidence. Initially, LGE states that those “significantly different prices *must be frequent enough* and persistent enough to constitute a ‘pattern’ of such prices.” This assertion is followed by LGE’s statement that “the plain meaning *does not focus mechanically on the mere frequency of instances*, but rather requires a ‘reliable sample’ to draw some conclusion about a ‘characteristic’ or ‘tendency’ . . .” 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.”⁷⁹ 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.⁸⁰

LGE 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, 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”⁸¹ which are being examined. LGE implies that if the data on which its analysis is based were “reliable,” then the Department would not find that a “pattern” exists. Not only is such reverse logic unreasonable, but LGE’s inclusion of the concept of a “reliable sample” is completely misplaced. For its analysis, the Department is using all of LGE’s U.S. sales data and not some subset which represents a sample of LGE’s U.S. sales. Thus, LGE’s references to “reliable sample,” “illusion of statistical validity,” or “variance or random ‘noise’ in the data”⁸² are inapposite. Such considerations are relevant when conclusions are drawn for a given population from an analysis of a statistically-valid sample of that population. This is not the situation with the Department’s application of a differential pricing analysis to determine whether the A-A method is appropriate, because the same U.S. sales that are used to calculate the weighted-average dumping margin under the A-A method or an alternative comparison method are the same U.S. sales that are analyzed in the differential pricing analysis.

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

⁷⁹ See LGE Case Brief at 44-45 (emphases added).

⁸⁰ *Id.* (emphasis added).

⁸¹ *Id.*

⁸² *Id.* at 44-48.

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.

Further, the statute requires that the prices in this arrangement or order must exhibit significant differences on a purchaser, region or time period basis. The Department has interpreted this to denote differences that are relative to the variations of prices within each group. As discussed above, one situation where such a pattern of prices that differ significantly may exist is where “targeted dumping may be 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.⁸³

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. 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.” 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 agrees with LGE that the term “differ” in the statute is modified by “significant.” From Webster’s Dictionary,⁸⁴ as cited by LGE,⁸⁵ “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 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.

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.⁸⁶

⁸³ See SAA at 842.

⁸⁴ See Webster’s Ninth New Collegiate Dictionary (1986) at 1096.

⁸⁵ See LGE Case Brief at 46, footnote 99.

⁸⁶ Id. at 46.

The Department agrees that the observed differences in prices must be taken in context when determining 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, 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 or exporter, may not be significant for a different industry, product and exporter, as the threshold for the difference being significant is defined by the pricing behavior of that respondent.

Although LGE claims that “none of these arguments about the proper meaning of these statutory terms relates to the subject intent of the exporter,” the Department still must “consider the particular factual circumstances of a particular case, so as to ensure the export price differences are actually ‘significant’ ... and ... constitute a ‘pattern’.”⁸⁷ Nonetheless, LGE objects to “the current policy by the Department to ignore any reasons for the pricing differences.”⁸⁸ Such arguments are misplaced since, as noted above, the CAFC has found that the statute places no requirement on the Department to discern either the intent or reasons behind an observed pattern of prices that differ significantly.⁸⁹

Thus, 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 price 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. As recognized in the SAA, one without the other does not result in masked dumping.⁹⁰ 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

⁸⁷ Id. at 46-47.

⁸⁸ Id. at 54.

⁸⁹ See JB F RAK, 790 F.3d at 1368; see also Borusan Mannesmann Boru Sanayi ve Ticaret v. United States, 608 Fed. Appx. 948, 949 (Fed. Cir. 2015) (Borusan).

⁹⁰ See SAA at 842.

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."⁹¹ 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, 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."⁹² In addressing Deosen's comment in Xanthan Gum from the PRC, the Department continued:

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 that 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.⁹³

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 of prices 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). We add that the CIT recently held that the Department's "reasons for choosing the Cohen's *d* test suffice to explain why the test is able to identify and

⁹¹ See PDM at 5.

⁹² 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.

⁹³ Id. (emphasis in original).

discern significant price differences,” and that the “use of the Cohen’s *d* test here is reasonable because its use identifies significant price differences.”⁹⁴

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, or “statistical validity,” as LGE suggests,⁹⁵ we note that if Congress had intended to require a particular result to ensure the “statistical validity” 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.”⁹⁶ LGE has reported all of its sales of subject merchandise in the U.S. market during the POR, and it is these data upon which the Department is basing its analysis consistent with the requirements of section 777A(d)(1)(B) of the Act, just as it has when calculating LGE’s weighted-average dumping margin. Accordingly, the Department’s calculation of the Cohen’s *d* coefficient includes no noise or sampling error, as the underlying means and variances used to calculate the Cohen’s *d* coefficient are not estimates, but the actual values based on the complete U.S. sales data as reported by LGE in this review. Therefore, LGE’s insistence that the Department first consider the statistical significance of its analysis is misplaced and would be inappropriate. In sum, because the Department’s use of the Cohen’s *d* test is based on the entire population of U.S. sales by the respondent, there are no estimates involved in the results and accordingly “statistical significance” is not a relevant consideration.⁹⁷

The Department disagrees with LGE’s claim that the Cohen’s *d* test’s thresholds of “small,” “medium,” and “large” are arbitrary.⁹⁸ Although these thresholds have qualitative labels, as described in the PDM, the Department stated that of these three thresholds, “the large threshold

⁹⁴ See Tri Union Frozen Prods. v. United States, CIT Slip Op. 16-33, at 78 (April 6, 2016) (Tri-Union).

⁹⁵ LGE Case Brief at 47-48.

⁹⁶ See Apex 2016 144 F. Supp. 3d at 1325 n.19.

⁹⁷ Indeed, the CIT has acknowledged the Department’s rationale that “[b]ecause Commerce’s {sic} analyzes all sales in identifying significant price differences, ‘sampling technique, sample size, and statistical significance are not a relevant consideration in this context,’” and held that a respondent was “unable to show why Commerce’s refusal to employ an additional test of statistical significance is unreasonable here.” See Tri Union, at 80.

⁹⁸ See LGE Case Brief at 49-50.

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.”⁹⁹ 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. Furthermore, as originally stated in Xanthan Gum from the PRC:

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.”¹⁰⁰

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

The Department disagrees with {the respondent’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...”¹⁰¹

⁹⁹ See PDM at 5.

¹⁰⁰ See Xanthan Gum from the PRC, and the accompanying Issues and Decision Memorandum at Comment 3 (internal citations omitted) (citing David Lane, et al., Chapter 19 “Effect Size,” Section 2 “Difference Between Two Means”).

¹⁰¹ See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2013-2014, 80 FR 55328 (September 15, 2015) (citing Jacob Cohen, Statistical Power Analysis for the Behavioral Sciences, Lawrence Erlbaum Associates, Publishers (1988), at 27 (citations omitted)).

Although these descriptions by Dr. Cohen are qualitative in nature, they are not arbitrary but represent real world observations. Further, Dr. Cohen’s “large” threshold, representing “grossly perceptible and therefore large differences,” is certainly consistent with Webster’s definition of “significant” noted above. Therefore, despite LGE’s contention, the Department finds the Cohen’s *d* test is a reasonable tool for use as part of an analysis to determine whether a pattern of prices differ significantly.

Contrary to LGE’s claim, it is reasonable for the Department to consider both lower-priced and higher-priced sales in the Cohen’s *d* analysis because higher-priced sales are equally as capable as lower-priced sales to indicate 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 sale price for a U.S. averaging group, or explicitly through the granting of offsets when aggregating the A-A comparison results, that can mask dumping. For that reason, looking at both higher and lower export prices in discerning whether there are significant price differences accords with the general statutory context of determining whether masked dumping may be occurring.

LGE asserts that the Department’s use of the “{high/low} approach makes absolutely no sense and is contrary to the statute,” continuing that the “key statutory terms ‘differ,’ ‘pattern,’ and ‘significantly’ all must be interpreted in light of the general statutory context of the antidumping law to address lower priced U.S. sales and the specific historical context of the concern about targeted dumping.”¹⁰² As noted above, the SAA states:

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.”¹⁰³

As set forth in the SAA, a concern with the new statutory framework enacted with the URAA was that the A-A method could conceal “targeted dumping,” which is recognized as involving, or even requiring as discussed above, both dumped (*i.e.*, lower-priced) sales and higher-priced sales which mask the dumping. Thus, both lower-priced sales and high-priced sales are intrinsically part of a pattern of prices that differ significantly which may lead to masked or “targeted” 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 priced lower or higher than the comparison sales. The statute does not provide that the Department consider only higher-priced sales or only lower-priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department explained that higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to

¹⁰² See LGE Case Brief at 52 (emphasis in original).

¹⁰³ See SAA at 842.

the analysis.¹⁰⁴ By considering all sales, higher-priced sales and lower-priced sales, the Department is able to analyze an exporter's pricing practice and to identify whether there is a pattern of prices that differ significantly. Moreover, finding such a pattern of prices that differ significantly among purchasers, regions, or periods of time, signals that the exporter has a varying pricing behavior 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 such pricing behavior, there is cause to continue with the analysis to determine whether the A-A method or the T-T method can account for such pricing behavior and is the appropriate tool to evaluate the exporter's amount of dumping. Accordingly, both higher- and lower-priced sales are relevant to the Department's analysis of the exporter's pricing behavior.¹⁰⁵

Further, LGE asserts that "higher and lower prices suggest a random distribution of prices, not any 'pattern' of possibly targeted sales."¹⁰⁶ The term "random distribution" is misplaced, because it either implies that the Department is relying on a sample of LGE's U.S. sales to make inferences regarding all of its U.S. sales, or that LGE's pricing behavior is random in nature. As discussed above, the Department's analysis includes all of LGE's U.S. sales which are being used to calculate its weighted-average dumping margin; thus, no sampling is involved in the Department's differential pricing analysis to examine whether the A-A method is appropriate for the margin calculation, and the Department is making no inferences, statistical or otherwise, regarding the overall pricing behavior of LGE in the U.S. market. Second, the Department finds that it is reasonable to expect that LGE, or any commercial enterprise, would have a logical pricing behavior established to meet the company's goals, such as making a profit; thus, positing that LGE's pricing behavior is random is illogical and unsupported by the record. As discussed above, a company's prices may, on the surface, appear to be scattered all over the place, but when these prices are organized by product, purchaser, region or time period, patterns may emerge which demonstrate significantly different prices among such groups.

With regard to LGE's argument that the Department failed to provide a reasoned explanation in the Preliminary Results for why the test for a "pattern" under its "previous tests," which focused on only low prices as compared to low and high prices, has been "abandoned," the Preliminary Results did not represent the first time the Department announced a change in practice. The Department "has been using its differential pricing analysis in investigations and reviews for some time now, including proceedings that were completed before {the Department} had issued the preliminary results" here.¹⁰⁷ For example, the Department applied the same analysis in the

¹⁰⁴ See Hardwood and Decorative Plywood From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 58273 (September 23, 2013), and accompanying Issues and Decision Memorandum at Comment 5.

¹⁰⁵ See Apex 2016, 144 F. Supp. 3d at 1330 ("All sales are subject to the differential pricing analysis because its purpose is to determine to what extent a respondent's U.S. sales are differentially priced, not to identify dumped sales. Commerce is not restricted in what type of sales it may consider in assessing the existence of such a pattern so long as its methodological choice enables Commerce to reasonably determine whether application of A-T is appropriate") (internal citations omitted); see also Tri Union, at 85-86 ("Considering all sales is not distortive. Commerce's methodology is reasonable in this regard because considering all sales allows Commerce to fully assess the breadth of a respondent's price differences").

¹⁰⁶ See LGE Case Brief at 53.

¹⁰⁷ See Tri Union, at 68.

AR1 Final Results.¹⁰⁸ In any event, the Department has explained above why it is appropriate under a differential pricing analysis to consider both high and low priced U.S. sales.

LGE also objects to including higher-priced sales when identifying sales that are “aberrantly” low, and similarly, finding other sales to have high prices simply because they are compared to sales with low prices. Even if one accepted this reasoning, LGE suggests no alternative for how to compare either the higher-priced sales or the lower-priced sales. In the simple situation where there are sales to two customers, A and B, and the prices to customer A differ significantly from the prices to customer B (higher or lower), then it is logical that the prices to customer B also differ significantly from the prices to customer A.

LGE also dismisses the appropriateness of the Department’s Cohen’s *d* test with the hypothetical example that certain sales are found to have prices which differ significantly higher than other prices, but no sales are found to have prices which differ significantly lower than other prices. Here, LGE misses the statutory requirements of a pattern of prices that differ significantly. These differences in prices among purchasers, regions or time periods are all for sales within the U.S. market. Accordingly, there is no comparison with normal value or consideration whether particular prices are dumped, as LGE implies. The high prices in LGE’s example may or may not be dumped; likewise for the lower prices. The purpose of this requirement is not to determine dumping, but to establish whether U.S. prices differ significantly, such that “targeted dumping,” where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions”¹⁰⁹ might exist. As discussed below with regards to the “meaningful difference” test, there is a wide range of outcomes where “targeted” or masked dumping may or may not exist, and even if masked dumping does exist, the differences still must be “meaningful” for the Department to resort to an alternative comparison method.

Similarly, LGE argues:

The fact that higher priced sales implicitly through the calculation of the weighted average price can affect the outcome {of the Cohen’s *d* and ratio tests} is already accounted for in using the mean of the weighted average sales prices in the Cohen’s *d* procedure. Thus, the effect of these higher priced sales on any masked dumping is already reflected in the use of the mean that includes these sales in the Cohen’s *d* procedure. One can only have hidden dumping when there are sales below the Cohen’s *d* threshold regardless of whether there are any sales above the Cohen’s *d* threshold.¹¹⁰

Again, LGE misses the fact that the consideration of prices that differ significantly is limited to prices in the U.S. market. There is no comparison to normal value, and no consideration whether U.S. prices are below or above normal value (i.e., dumped or not). Accordingly, LGE’s conflation of the position and impact of higher- priced sales in the Cohen’s *d* test and in the margin calculations is illogical and inappropriate.

¹⁰⁸ See AR1 Final Results, at Comment 5.

¹⁰⁹ See SAA at 842.

¹¹⁰ See LGE’s Case Brief at 57-58.

Therefore, the Department disagrees with LGE's suggestion that the Department only consider lower-priced U.S. sales as being able to contribute to a pattern of prices that differ significantly. For these final results, the Department has continued to include both lower-priced and higher-priced U.S. sales which pass the Cohen's *d* test as contributing to a potential pattern of prices that differ significantly.

Consideration of Distinction Between OEM and Non-OEM Sales, and Distinction Between Sales of Prime Merchandise and Sales of Non-Prime (Defective Merchandise), in the Differential Pricing Analysis

With respect to LGE's contention that its sales to OEM customers should be considered separately from sales to non-OEM customers because they are buying the product on a "fundamentally different basis,"¹¹¹ we agree with the petitioner that it is incumbent upon LGE to demonstrate that sales to its OEM customers constitute a level of trade separate from that of LGE's sales to non-OEM customers. The Department's Cohen's *d* test takes into account each of the factors that are used in the comparison of U.S. price with normal value, including different levels of trade.¹¹² However, the Department determined that LGE's sales to the United States constituted a single level of trade, which does not affect the comparability of U.S. price with normal value,¹¹³ and likewise would not affect the comparability of U.S. prices among purchasers, regions or time periods. We note that the U.S. price used to analyze U.S. sales for differential pricing is, among other things, net of selling expenses. Thus, in comparing U.S. sales to OEM customers with U.S. sales to non-OEM customers, the net price accounts for differences in warranty coverage and other differences in selling expenses and sales terms.

With respect to LGE's concerns regarding the inclusion of non-prime LRW sales in the differential pricing analysis, we point out that our differential pricing methodology separately compares sales of prime LRWs and non-prime LRWs.¹¹⁴ That is, prices for U.S. sales of non-prime LRWs are only compared to prices of other U.S. sales of non-prime merchandise, just as the U.S. prices of non-prime merchandise are only compared to normal values based on the comparison market sales or the constructed value of non-prime merchandise. Accordingly, inclusion of non-prime U.S. sales in the differential pricing analysis does not distort the results of the Cohen's *d* or ratio tests, just as inclusion of non-prime U.S. sales does not distort the calculation of the respondent's weighted-average dumping margin.

Finally, to the extent that LGE claims that the Department is required to consider attendant factual circumstances in identifying whether a pattern of export prices that differ significantly exists, the Federal Circuit has held that section 777A(d)(1)(B) of the Act "does not require {the Department} to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods," and that

¹¹¹ See LGE Case Brief at pages 59-60.

¹¹² See PDM at 5; see also Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Antidumping Duty Administrative Review: 2013-2014, 81 FR 7750 (February 16, 2016), and accompanying Issues and Decision Memorandum at Comment 4 ("the Department does use adjusted prices from its dumping calculations in its differential pricing analysis to ensure that its analyses are not affected by such elements as differences in the level of trade").

¹¹³ See PDM at page 11.

requiring the Department to consider the intent of a respondent “would create a tremendous burden on {the Department} that is not required or suggested by the statute.”¹¹⁵

Explanation Why Such Differences Cannot be Taken into Account Using the A-A Method

The Department disagrees with LGE that we did not provide an adequate explanation of 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 moves across the de minimis threshold, the Department finds the difference to be meaningful.¹¹⁶ Here, such a meaningful difference exists for LGE because when comparing LGE’s weighted-average dumping margin calculated pursuant to the A-A method and an alternative comparison method based on applying the A-T method only to those U.S. sales that passed the Cohen’s *d* test, LGE’s weighted-average dumping margin moves across the de minimis threshold. This threshold is reasonable because comparing the weighted-average dumping margins calculated using the two comparison methods allows the Department to quantify the extent to which the A-A method cannot take into account different pricing behaviors exhibited by the exporter in the U.S. market. In LGE’s situation in this review, it means the difference between assessing or not assessing antidumping duties and providing or not providing a remedy to the domestic industry for dumping which has been found to be injurious. The CIT has upheld the sufficiency of this explanation in similar factual circumstances, namely, where the A-A method applied to a respondent results in a de minimis margin and the A-T method reveals an above-de minimis margin.¹¹⁷

We also disagree that this comparison merely constitutes a “perfunctory statement” and not a “reasonable explanation.”¹¹⁸ The simple comparison of these two results belies all of the complexities in calculating and aggregating individual dumping margins. It is the interaction of these many comparisons of EPs or CEPs with NVs which determine whether there is a meaningful difference in these two results.

¹¹⁴ See Memorandum to the File entitled “Preliminary Results Margin Calculation for LGE,” dated March 4, 2016, at Attachment 2, Margin Calculation SAS Log at 60 (example of SAS programming that demonstrates U.S. sales are sorted by prime or non-prime products, among other factors, before differential pricing analysis is conducted).

¹¹⁵ See JBF RAK and Borusan.

¹¹⁶ See PDM at 6.

¹¹⁷ See Apex 2016, 144 F. Supp. 3d at 1334-35 (“In furtherance of that objective, it is reasonable for Commerce to presume that A-A cannot account for the price differences in instances where A-A is unable to uncover any dumping at all and A-T is able to do so. Therefore, Commerce’s explanation that A-A could not account for the significant price differences here is reasonable”); see also Samsung at 1368 (Although in the original investigation of LRW from Korea the Department relied on a “targeted dumping” analysis rather than a differential pricing analysis, the requirement and analysis under section 777A(d)(1)(B)(ii) of the Act remains unchanged here. In its opinion, the court stated: “Commerce below explained that ‘the A-to-A method does not take into account such price differences because there is a meaningful difference in the weighted average dumping margins when calculated using the A-to-A method and the A-to-T method for both respondents.’ Specifically, Samsung’s margin increased from de minimis to 9.29% using A-to-T, and LG’s margin increased from a proprietary margin to 13.02% using A-to-T. Commerce’s explanation is reasonable. Cf. Apex Frozen Foods Private Ltd. v. United States, 37 F. Supp. 3d 1286, 1294-300 (2014) (sustaining similar explanation as reasonable in the context of arbitrariness review, and commenting in dicta that a similar explanation would survive substantial evidence review) (citations omitted)).

¹¹⁸ See LGE Case Brief at 67.

When using the A-A method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) can be offset by higher-priced U.S. sales. Congress was concerned about offsetting and that concern is reflected in the SAA which states that “targeted dumping” is a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”¹¹⁹ The comparison of a weighted-average dumping margin based on a weighted-average U.S. price that also reflects offsets for non-dumped sales with a weighted-average dumping margin based on the individual, constituent transaction-specific U.S. prices without such offsets (*i.e.*, with zeroing) precisely examines the impact on the amount of dumping which is hidden or masked by the A-A method. Both the weighted-average U.S. price and the individual U.S. prices are compared to a NV that is independent and constant because the characteristics of the individual U.S. sales¹²⁰ remain constant whether a weighted-average U.S. price or individual U.S. prices are used in the analysis.

Consider the simple situation where there is a single weighted-average U.S. price, this average is made up of a number of individual U.S. sales which exhibit different prices, and the two comparison methods under consideration are the A-A method with offsets (*i.e.*, without zeroing) and the A-T method with zeroing.¹²¹ The normal value used to calculate a weighted-average dumping margin for these sales will fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

- 1) the NV is less than all of the U.S. prices and there is no dumping;
- 2) the NV is greater than all of the U.S. prices and all sales are dumped;
- 3) the NV is nominally greater than the U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;¹²²
- 4) the NV is nominally less than the U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;
- 5) the NV is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant amount of offsets generated from non-dumped sales.

¹¹⁹ See SAA at 842.

¹²⁰ These characteristics may include such items as product, level-of-trade, time period, and whether the product is considered as prime- or non-prime merchandise.

¹²¹ The calculated results using the A-A method with offsets (*i.e.*, no zeroing) and the calculated results using the A-T method with offsets (*i.e.*, no zeroing) will be identical. See Memorandum to the File entitled “Final Results Margin Calculation for LG Electronics Inc.,” dated contemporaneously with this memorandum, at Attachment 2, Margin Calculation SAS Output at 125-127, 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.

¹²² As discussed further below, 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.

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 in the PDM. 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 also does not constitute a meaningful difference, and the A-A method will be used. Under scenario (4), there is a significant (i.e., non-de minimis) amount of dumping with only a minimal amount of non-dumped sales, such that 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 and the A-A method will be used. Lastly, under scenario (5), there is a significant, non-de minimis amount of dumping and a significant amount of offsets generated from non-dumped sales such that there is a meaningful difference in the weighted-average dumping margins calculated using offsets and zeroing (i.e., there is at least a 25 percent relative change in the dumping margin or there is a change from de minimis to non-de minimis).

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 this outcome. Under scenario (4), there exists an above-de minimis amount of dumping, and the offsets are not sufficient to meaningfully change the results. Only with scenario (5) is there an above-de minimis amount of dumping with a sufficient amount of offsets such that the weighted-average dumping margin will be meaningfully different under the A-T method with zeroing as compared to the A-T / A-A method with offsets. This difference in the calculated results is meaningful in that a non-de minimis amount of dumping is now masked or hidden to such an extent that the amount of dumping calculated using the A-T / A-A method with offsets is found to be zero or de minimis, or to have decreased by 25 percent of the amount of 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 that there also is a meaningful amount of offsets to impact the identified amount of dumping. Furthermore, the NV must fall within an even narrower range of values (i.e., narrower than the price differences exhibited in the U.S. market) such that the 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 the weighted-average dumping margin in order to result in an overall weighted-average dumping margin which changes to a meaningful extent.

Further, for each individual dumping margin which does not result in the set of circumstances in scenario (5), the “meaningfulness” of the difference in the weighted-average dumping margins between the two comparison methods will be diluted. This result occurs because, for these A-A comparisons which do not exhibit a meaningful difference with the A-T comparisons, there will be little or no change in the amount of dumping (i.e., the numerator of the weighted-average dumping margin) but the U.S. sales value of these transactions will nonetheless be included in

the total U.S. sales value (i.e., the denominator of the weighted-average dumping margin). The aggregation of these intermediate A-A comparison results where there is no “meaningful” difference will thus dilute the significance of other A-A comparison results where there is a “meaningful” difference, which the A-T method avoids.

Moreover, 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 accounts 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. That is the situation in this review.

With respect to LGE’s contention that the meaningful difference analysis merely measures the impact of zeroing,¹²³ we believe that LGE obfuscates the issue. The purpose of zeroing is to expose the “targeted” or masked dumping taking place.¹²⁴ Indeed, the masking of LGE’s dumping is such that the A-A method showed no amount of dumping at all. By contrast, the alternative comparison method reveals an above de minimis amount of dumping. If the A-A method had been the basis for these final results of review, then masking would have resulted in no antidumping duties being assessed for LGE’s pricing behavior in the U.S. market. In this situation, Congress’s intent of addressing so-called “targeted dumping,” when the requirements of section 777A(d)(1)(B) of the Act are satisfied, would be thwarted with regard to LGE if the A-A method were applied. It is for this reason that the Department finds that the A-A method cannot take into account the pattern of prices that differ significantly for LGE, 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 an alternative comparison method based on the A-T method is appropriate for LGE in these final results.

Thus, the Department disagrees with LGE’s claim that the Department has failed to adequately explain why the A-A method cannot account for such differences. The Department has satisfied the “explanation” requirement, as set forth under section 777(A)(d)(1)(B)(ii) of the Act, and continues to find that the A-A method cannot take into account LGE’s pricing behavior in the U.S. market.

Finally, to the extent LGE may be arguing that the Department can only consider the sales that passed the Cohen’s *d* test in its meaningful difference analysis,¹²⁵ we note that the CIT has held that “{i}t is reasonable for {the Department} to judge whether A-A is able to account for the

¹²³ See LGE Case Brief at 68.

¹²⁴ See Apex 2016, 144 F. Supp. 3d at 1334-35 (“{t}he purpose of A-T is to reveal those cases where offsetting masks dumping, and that purpose is achieved by zeroing”).

¹²⁵ See LGE Case Brief at 67 (“the mere fact that Commerce found overall dumping margins to be different under the two methodologies says nothing about the export transactions that fell within the ‘pattern’ of export prices that ‘differ significantly’ as required by the statute”).

price differences by assessing its ability to do so against all sales, as it would ultimately need to be able to do so when calculating the dumping margin.”¹²⁶

Relevance of the DS464 Panel Report

The Department disagrees with LGE’s reliance on the DS464 Panel Report¹²⁷ to support LGE’s arguments against certain aspects of the Department’s differential pricing analysis. “WTO decisions are ‘not binding on the United States . . .’”¹²⁸ Indeed, the SAA explicitly states that “WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.”¹²⁹

Conclusion

Accordingly, for all of the foregoing reasons, we find that the Department’s differential pricing analysis is consistent with section 777A(d)(1)(B) of the Act. Furthermore, the differential pricing analysis represents a reasonable framework to determine whether the A-A method is appropriate, and if not, then how the A-T method may be considered as an alternative to the standard A-A method.

Comment 6: Zeroing

LGE challenges the Department’s differential pricing methodology with respect to the denial of offsets for non-dumped sales when applying the A-T method, a practice known as “zeroing.”¹³⁰ 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 method cannot account for price differences violates WTO precedent. Furthermore, LGE argues that the Department cannot “zero” the total comparison results, when negative, for the A-A method when combining them with the total comparison results for the A-T method.

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 comparison results for non-dumped sales from the overall calculation of a weighted-average dumping margin, the Department is calculating an overall rate 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, including the DS464 Panel Report, LGE asserts that the Department also inappropriately failed to 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

¹²⁶ See Apex 2016, 144 F. Supp. 3d at 1334.

¹²⁷ See LGE Case Brief at 64-65, 69-70.

¹²⁸ See Corus Staal, 395 F.3d at 1348 (quoting Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir. 2004)).

¹²⁹ See SAA at 659.

¹³⁰ That is, the negative margins are set to zero.

A-A method. LGE asserts that this practice effectively constitutes zeroing, and 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.

The petitioner responds that zeroing when applying the A-T method 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.¹³¹ According to the petitioner, the Department could 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 a pattern of prices that differ significantly among customers, regions, or periods of time. Furthermore, when combining the A-T results with the A-A results under the mixed comparison method, the petitioner asserts that it would make little sense to allow the A-A results to offset the A-T results because it re-masks dumping that has been found when applying the A-T method. With respect to LGE's references to WTO determinations, including the DS464 Panel Report, the petitioner maintains that WTO decisions are without effect under U.S. law "unless and until such a {decision} has been adopted pursuant to the specified statutory scheme" established in U.S. law.¹³² The petitioner adds that, not only has the DS464 Panel Report not been implemented into U.S. law, this panel decision has been appealed by both of the parties to the dispute and thus this panel decision is irrelevant to this administrative review.

The Department's Position:

We agree with the petitioner. As an initial matter, the courts have affirmed the Department's discretion to choose whether to zero or grant offsets for non-dumped transactions when aggregating individual dumping margins (i.e., comparison results) to calculate a respondent's weighted-average dumping margin. LGE concedes this point, stating "the Department has the discretion under U.S. law to apply or not apply zeroing."¹³³ The Department 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

¹³¹ See Petitioner Rebuttal Brief at 45-46 (citing Union Steel v. United States, 713 F. 3d 1101, 1109 (Fed. Cir. 2013) (Union Steel), and U.S. Steel Corp. v. United States, 621 F. 3d 1351, 1363 (Fed. Cir. 2010) (US Steel Corp.)).

¹³² Id. at 48-49 (citing Corus Staal BV v. United States, 395 F.3d 1343 (Fed. Cir. 2005); Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007); NSK, 510 F.3d at 1375, 1380; and SAA at 659).

¹³³ See LGE's Case Brief at 75.

dumping concerns.”¹³⁴ 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.¹³⁵ In addition, the CIT has repeatedly sustained the Department’s authority to deny offsets under the A-T comparison method where the requirements of section 777A(d)(1)(B) of the Act are satisfied.¹³⁶

Moreover, the Department’s application of the mixed alternative method¹³⁷ 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.¹³⁸ No legal authority requires LGE’s proposed approach to the mixed comparison method. Here, if the Department were to offset positive A-T comparison results with an overall negative A-A comparison result (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 comparison methods 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 T-T 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 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. The CIT has likewise sustained the Department’s approach to applying the mixed comparison method.¹³⁹

¹³⁴ See Union Steel, 713 F.3d at 1106.

¹³⁵ See US Steel Corp., 621 F.3d. at 1351.

¹³⁶ See, e.g., Apex 2014, 37 F. Supp. 3d at 1304-06; Timken Co. v. United States, CIT Slip Op. 16-47, at 17-18 (May 10, 2016); Apex 2016, 144 F. Supp. 3d at 1333-34.

¹³⁷ Although for these final results we are not applying the A-T method to all sales, LGE has argued that the statute requires the Department to apply the exceptional comparison method only to those sales “found to qualify for the exception.” See LGE Case Brief at 71-72, footnote 125. However, the CIT has held that the Department has the authority to apply the A-T method to all sales in an administrative review where the requirements of section 777A(d)(1)(B) are satisfied. See Apex 2014, 37 F. Supp. 3d at 1301-02.

¹³⁸ See U.S. Steel Corp., 621 F.3d at 1357.

¹³⁹ See Apex 2016, 144 F. Supp. 3d at 1336 (“Commerce’s method of aggregating two separate weighted averages, one with offsets and one without, is reasonable because it proportionately applies the remedy across the sales. It is not unreasonable for Commerce to decline to use offsets during the aggregation stage because, as explained by Commerce, without such offsets, the masked dumping uncovered by the analysis is preserved and the A-T remedy nonetheless remains confined to the differentially priced sales by ‘summing the amount of dumping and the U.S. sales value for each of these methods’”) (citation omitted).

The Department disagrees with LGE's assertion that the Department must follow WTO decisions, especially ones that have not come to a final and conclusive determination. The Department notes that LGE relies on DS464 Panel Report as a basis to challenge zeroing. However, once again, that panel report has not been adopted by WTO Members, and the manner in which any eventual report might be implemented by the United States is "far from clear."¹⁴⁰ As stated above, "WTO decisions are 'not binding on the United States . . .'"¹⁴¹ Indeed, the SAA explicitly states that "WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it."¹⁴² Accordingly, the Department has not altered its approach in aggregating the comparison results, whether within the A-T method or between the A-A method and the A-T method.

Comment 7: Subassembly Import Value in Assessment Rate

LGE's imports of LRW subassemblies includes units imported for its affiliate LGEAI's use in performing in-warranty repairs, as well as units resold to unaffiliated customers for out-of-warranty repairs. LGE contends that, in calculating LGE's importer-specific assessment rate, the Department should take into account the subassemblies that were imported for LGEAI's use for in-warranty repairs and never sold to unaffiliated customers. To accomplish this adjustment, LGE proposes setting the antidumping duty margin to zero for these entries.

The petitioner responds that LG provides neither statutory authority nor record evidence to support such an adjustment.

The Department's Position:

LGE included its imports of LRW subassemblies for in-warranty repairs as part of the U.S. subassembly sales database. These entries were reported with no value in the gross unit price data field, but with an amount reported for the entered value.¹⁴³ These transactions were excluded from the preliminary results margin analysis. LGE would have the Department include these transactions in the analysis at a zero price, and set the margin at zero, but include the reported entered value in the total value of the denominator used to determine the assessment rate. We agree with the petitioner that there is no statutory authority to support such an adjustment. The value of the subassemblies at issue is properly included as part of LGE's reported warranty expense.¹⁴⁴ No further adjustment or treatment is warranted.

¹⁴⁰ See NSK, 510 F.3d at 1380.

¹⁴¹ See Corus Staal, 395 F.3d at 1348 (quoting Timken, 354 F.3d at 1344).

¹⁴² See SAA at 659.

¹⁴³ See QRC Exhibit C-4A at C-1.

¹⁴⁴ See SQRABC at Exhibit FS C-4.

VI. 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 margin for LGE in the Federal Register.



Agree

Disagree



Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations



(Date)