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

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THROUGH: Irene Darzenta Tzafolias *IDT*  
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SUBJECT: Issues and Decision Memorandum for the Amended Final Results  
of the Antidumping Duty Administrative Review of Large  
Residential Washers from Mexico

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## SUMMARY

We analyzed the ministerial error allegation made by Electrolux<sup>1</sup> in the 2012-2014 administrative review of the antidumping duty order on large residential washers (LRWs) from Mexico. As a result of our analysis, we made two changes to Electrolux's comparison market program. These changes affect the results of the Department's differential pricing analysis in these amended final results.<sup>2</sup> Therefore, we are also addressing the differential pricing and zeroing issues raised by Electrolux in its case and rebuttal briefs, because they are no longer moot in these amended final results. 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 in these amended final results:

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<sup>1</sup> Electrolux refers collectively to Electrolux Home Products, Corp. N.V. and Electrolux Home Products de Mexico, S.A. de C.V.

<sup>2</sup> See Memorandum from Brian Smith, Team Leader, to Melissa G. Skinner, Director, Office II, "2012-2014 Administrative Review of the Antidumping Duty Order on Large Residential Washers from Mexico: Ministerial Error Allegation for the Final Results."



1. Differential Pricing Analysis
2. Zeroing

## DISCUSSION OF THE ISSUES

### **Comment 1: Differential Pricing Analysis**

Electrolux argues that the differential pricing analysis applied in the Preliminary Results<sup>3</sup> is incomplete, internally inconsistent, and, with respect to Electrolux, leads to results that greatly overstate the share of its U.S. sales that could plausibly be considered to demonstrate the pattern of pricing differences that the Department preliminarily determined existed.

Electrolux lists the following flaws in the Department's Cohen *d* test and program used to administer the test, and claims these flaws make the test unsuited for the "targeted dumping" analysis:

- the Cohen's *d* test fails to distinguish between prices which are higher and prices that are lower than the average comparison price in the U.S. market;
- the Cohen's *d* test does not identify causal links;
- the Cohen's *d* test does not consider statistical significance;
- the Cohen's *d* test says nothing about the relative magnitude of the observed price differences;
- the Cohen's *d* test fails to define appropriate comparison groups;
- the Cohen's *d* test should include additional testing of the sales flagged as passing or failing the Cohen's *d* test; and
- the ratio test should not aggregate the results of the Cohen's *d* test to examine whether a pattern of prices that differ significantly exists.

Electrolux also argues that the Department failed to explain why the average-to-average (A-A) method cannot account for such pricing differences.

If the Department continues to apply the same methodology in the final results as it did in the preliminary results, Electrolux argues that the Department must modify its "pattern of pricing" test to ensure that its results are accurate. Specifically, Electrolux proposes including a step in the methodology that tests the group of transactions identified as passing the Cohen's *d* test against the group of transactions identified as not passing the Cohen's *d* test. Electrolux adds that this modification is the only way one can claim that sound evidence exists that certain transactions demonstrate a pattern of prices that differ significantly from the control group. Otherwise, Electrolux claims that the Department's existing test will cause significant harm to Electrolux because it inappropriately and incorrectly supports the Department's application of zeroing when deriving Electrolux's weighted-average dumping margin.

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<sup>3</sup> See Large Residential Washers From Mexico: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments: 2012-2104, 80 FR 12436 (March 9, 2015) (Preliminary Results).

Finally, Electrolux argues that, even if the Department properly finds the existence of a pattern of prices that differ significantly, it must adequately explain why the price differences cannot be taken into account using the normal comparison methodology, as required under section 777A(d)(1)(B) of the Tariff Act of 1930, as amended (the Act).<sup>4</sup>

The petitioner contends that the Department's Cohen's *d* analysis is a reasonable interpretation of the statute and Electrolux's claims that the Department's methodology is incomplete, internally inconsistent, and unrealistic are meritless. The petitioner points out that in defense of the Department's approach, the Court of International Trade (CIT) has affirmed recently and repeatedly recognized that the Department has ample discretion under section 777A(d) of the Act.<sup>5</sup> Furthermore, the petitioner contends that Electrolux fails to cite any statutory provision that requires the use of its methodology or supports its definition of how the Department's current method should determine what a pattern of prices that differ significantly is or the terms therein. As the statute is silent on the meaning of these terms (*i.e.*, pattern, differ, and significant), the petitioner argues that this fact confirms the discretion Congress has given to the Department in determining how to identify a pattern of prices that differ significantly.

In response to Electrolux's alleged list of flaws in the Department's Cohen's *d* analysis, the petitioner claims that the Department addressed similar arguments in a prior case,<sup>6</sup> explaining that its current test is an appropriate and reasonable approach to determine whether U.S. prices differ significantly because it adequately defines what it is measuring (*i.e.*, the difference between two groups and its significance).

In response to Electrolux's argument that the Department's analysis is insufficient because the Cohen's *d* analysis does not demonstrate "statistical significance," the petitioner contends that the Department has already addressed and rejected Electrolux's argument in Copper Tube from Mexico, explaining that statistical significance is irrelevant when applying the Cohen's *d* test to a known dataset. Moreover, the petitioner points out that the statute does not require that the difference be statistically significant, rather only that it be significant, and the Cohen *d* test analysis satisfies this requirement.<sup>7</sup>

In reply to Electrolux's contention that the Department improperly shifts the test group and comparison group by testing variations by purchaser, region, and time, the petitioner points out that the statute requires the Department to consider whether a pattern of prices that differ significantly exists in each of the above-mentioned test groups and, that by testing each group,

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<sup>4</sup> "The {Department} 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)."

<sup>5</sup> See, e.g., Apex Frozen Foods Private Ltd v. United States (Apex), 37 F. Supp. 3d 1286 (CIT 2014).

<sup>6</sup> See Seamless Refined Copper Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review: 2011-2012, 79 FR 36719 (June 30, 2014) (Copper Tube from Mexico), and accompanying Issues and Decision Memorandum at Comment 4.

<sup>7</sup> In support of its argument, the petitioner cites to Certain Activated Carbon From the People's Republic of China: Final Results of Antidumping Duty Administrative Review: 2011-2012, 78 FR 70533 (November 26, 2013) (Activated Carbon), and accompanying Issues and Decision Memorandum at Comment 4.

the Department's Cohen *d* analysis is consistent with the statute. The petitioner also points out that the Department addressed this same argument in a recent case involving Shrimp from Vietnam<sup>8</sup> by stating that the purpose of the Cohen's *d* test is to evaluate whether sales of comparable merchandise to a particular purchaser, region or time period in each test group exhibit prices that are significantly different from sales to all other purchasers, regions, or time periods, respectively. The petitioner further states that the Department also articulated in Shrimp from Vietnam that once the comparison results are aggregated to determine whether there exists a pattern, the Department will then examine whether the standard A-A method can account for such differences. Regarding Electrolux's argument that the Department must retest the aggregated sales that pass the Cohen's *d* analysis, the petitioner states that this argument is without merit as these sales have already been found to be at prices that differ significantly under the statutory categories. Moreover, regarding Electrolux's insistence that the Department look at the individual sales to specific purchasers, regions and time periods within each test group, the petitioner states that there is no support in the statute requiring the Department to conduct such an analysis and no mention in the statute that the Department cannot examine an exporter's pricing behavior as a whole.

Finally, with respect to Electrolux's argument that the Department should not include sales that are higher-priced than the mean in its Cohen's *d* analysis, the petitioner points out that the statute is silent on whether price differences are high or low relative to the mean. The petitioner also mentions that the Statement of Administrative Action (SAA) explains that high prices are relevant when there is reluctance to use an A-A method because of a concern that such a method could conceal targeted dumping.<sup>9</sup> The petitioner also notes that the Department's need to examine high-priced sales for purposes of determining whether such sales might be masking dumping is supported by court decisions and case precedent.<sup>10</sup>

In reply to Electrolux's contention that the Department must adequately explain why the normal comparison methodology cannot be used, the petitioner counters that the Department satisfied the second prong of the statute when it explained that the A-A comparison could not account for Electrolux's masked dumping. The petitioner asserts that the CIT addressed this argument squarely in Apex,<sup>11</sup> explaining that the A-A normal comparison methodology cannot be used because of the existence of masked dumping.

#### The Department's Position:

As a general matter, the Department disagrees with Electrolux's claims that the application of a differential pricing analysis, including the Cohen *d* and ratio tests, is incomplete and internally inconsistent. Nothing in the statute or the SAA mandates how the Department measures whether there is a pattern of prices that differ significantly, how the Department explains why one of the standard comparison methods (*i.e.*, the A-A method or the transaction-to-transaction (T-T)

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<sup>8</sup> The petitioner cites Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review; 2012-2013, 79 FR 57047 (September 24, 2014) (Shrimp from Vietnam), and accompanying Issues and Decision Memorandum at Comment 2; and Activated Carbon.

<sup>9</sup> See SAA at 843.

<sup>10</sup> The petitioner cites to Koyo Seiko Co., Ltd., vs. United States, 20 F.3d 1156, 1159 (Fed. Cir. 1994) in support of its argument.

<sup>11</sup> See Apex, 37 F. Supp. 3d at 1296.

method) cannot account for such differences, or how the Department applies the average-to-transaction (A-T) method as an alternative comparison method. Accordingly, the Department has reasonably created a framework to determine whether the A-A method is appropriate,<sup>12</sup> and if it is determined not to be appropriate, then how the A-T method may be considered as an alternative to the standard A-A method based on the extent of the pattern of prices that differ significantly, as identified by the Cohen's *d* test. Furthermore, the Department's application of the A-T method as an alternative comparison method to the A-A method is reasonable and consistent with a series of decisions from the Court of Appeals for the Federal Circuit (CAFC) and the CIT, including JBF RAK LLC v. United States, 790 F.3d 1358 (Fed. Cir. 2015) (JBF RAK) in which the CAFC held that the Department may apply the A-T method in administrative reviews and that the Act does not "mandate which comparison methods Commerce must use in administrative reviews." In that decision the CAFC also held that the SAA "does not limit the proceedings in which Commerce may consider an alternative comparison method" when an A-A comparison "cannot account for a pattern of United States prices that differ significantly among purchasers, regions or time periods" in an administrative review. *Id.*

*The Cohen's d test fails to distinguish between prices which are higher and prices that are lower than the average comparison price in the U.S. market.*

We disagree with Electrolux that the Department is required to distinguish between prices which are higher and prices which are lower than the average comparison price in the U.S. market in our differential pricing analysis. In determining whether a pattern of export prices existed, the Department correctly applied the Cohen's *d* test to all of Electrolux's export prices. Contrary to Electrolux'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 create a pattern of prices that differ significantly. Higher-priced sales will offset lower-priced sales, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, which can mask dumping. The statute states that the Department may apply the A-T method if "there is a *pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time,*" and the Department "explains why *such differences* cannot be taken into account" using the A-A comparison method.<sup>13</sup> The statute directs the Department to consider whether there exists a pattern of prices that differ significantly. The statutory language references prices that "differ" and does not specify whether the prices differ by being lower or higher than the remaining prices.

Higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis.<sup>14</sup> Higher- or lower-priced sales could be dumped or could be masking other dumped sales. When the Department applies the first stage of the differential pricing analysis, the Department is unaware for purposes of its analysis if sales are dumped or not. That is not the issue at that stage of the differential pricing analysis. The question at that stage is whether or not

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<sup>12</sup> See 19 CFR 351.414(c)(1).

<sup>13</sup> See section 777A(d)(1)(B) of the Act (emphasis added).

<sup>14</sup> 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) (Plywood), and accompanying Issues and Decision Memorandum at Comment 5.

a pattern of prices that differ significantly exists. In answering the question of whether there is a pattern of prices that differ significantly, this analysis includes no comparisons with NVs. Indeed, section 777A(d)(1)(B)(i) of the Act contemplates no such comparisons.

By considering all sales, higher-priced sales and lower-priced sales, the Department is able to analyze an exporter's pricing behavior, 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, rather than a uniform pricing behavior, could signal that the exporter is exhibiting conditions in the U.S. market in which dumping could be masked. Where the evidence indicates that the exporter is engaged in a varying pricing behavior which results in such a condition where dumping may be masked, we believe that there is cause to continue with the analysis to determine whether the A-A method can account for such pricing behavior.

As explained in the SAA, with "targeted dumping," "an exporter may sell at a dumped {e.g., lower} price to particular customers or regions, while selling at higher prices to other customers or regions."<sup>15</sup> Thus, Congress, in recognizing the concerns regarding targeted, or masked, dumping, emphasized that this concern about masked dumping not only included lower-priced sales which may be dumped, but also higher-priced sales which could conceal or mask dumping. Accordingly, both higher- and lower-priced sales are relevant to the Department's analysis of the exporter's pricing behavior, consistent with the requirements of section 777A(d)(1)(B)(i) of the Act and the relevant language in the SAA.

*The Cohen's d test does not identify causal links.*

We disagree with Electrolux that because the Cohen's *d* test does not identify causal links, the test is unsuited for our analysis. The statute requires only a finding of a pattern of prices that differ "significantly;" the statute does not require that the Department identify and address causal links or the intent of the exporter as an excuse for observed prices that differ significantly. The CAFC and CIT have held 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).<sup>16</sup> The CAFC has stated:

Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. As a result, Commerce looks to its practices in antidumping duty investigations for guidance. Here, the 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

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<sup>15</sup> See SAA at 842.

<sup>16</sup> See *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1355 (CIT 2014); *aff'd JBF RAK*, 790 F.3d 1358. See also *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 2015 U.S. App. LEXIS 10653 (Fed. Cir. 2015). See also *Apex*, 37 F. Supp. 3d at 1301 (stating that "the statute does not require Commerce to decide why sales were targeted before imposing the A-T remedy").

statute.” JBF RAK, 991 F. Supp. 2d at 1355 (internal quotation marks and citation omitted).<sup>17</sup>

*The Cohen’s d test does not consider statistical significance.*

The Cohen’s *d* coefficient is one approach to quantifying an “effect size” and it “is a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group.”<sup>18</sup> Within the Cohen’s *d* test, the Cohen’s *d* coefficient is calculated based on the means and variances of the test group and the comparison group. The test and comparison groups include all of the U.S. sales of comparable merchandise reported by the respondent. As such, the means and variances calculated for these two groups are the actual values for these measures and they are based on the entire universe of sales (*i.e.*, the entire population of data).

Statistical significance is used to evaluate whether the results of an analysis rise above sampling error (*i.e.*, noise) present in the analysis. This arises in analyses which are based on sampled data from a larger population of data where the calculated measures (*e.g.*, mean and standard deviation) are estimates of the actual values of the entire population of data. The Department’s application of the Cohen’s *d* test is based on the mean and variance calculated using the entire population of the respondent’s sales in the U.S. market, and, therefore, these values contain no sampling error. Accordingly, statistical significance is not a relevant consideration in this context.

If Congress had intended that there be “statistical significance” of price differences that mask dumping as a condition for applying an alternative comparison method, Congress presumably would have used language more precise than “differ significantly.” The Department, tasked with implementing the antidumping law, resolving statutory ambiguities, and filling gaps in the statute, does not agree with Electrolux that the term “significantly” in the statute can mean only “statistically significant.” The Act 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.” Therefore, Electrolux’s argument is meritless.

*The Cohen’s d test says nothing about the relative magnitude of the observed price differences.*

The Department disagrees with Electrolux that its analysis ignores the “relative magnitude” of the observed price differences. The Department interprets Electrolux’s argument to mean that the Department’s analysis ignores the magnitude of the difference in prices relative to the absolute price level in the U.S. market. For example, a one dollar price difference has a different meaning when market prices are around ten dollars as opposed to when they are around one thousand dollars.

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<sup>17</sup> See JBF RAK, 790 F.3d at 1368.

<sup>18</sup> See Preliminary Results, and accompanying Decision Memorandum (Preliminary Results Decision Memorandum) at page 6.

The concept behind the Cohen's  $d$  coefficient is that it quantifies the degree of the difference in the means of the prices within the test and comparison groups relative to the variances of the individual prices within each of the two groups. These variances are the basis for the "pooled standard deviation" which is the denominator of the Cohen's  $d$  coefficient. When the variance of prices is small within these two groups, then a small difference between the weighted-average sale prices of the two groups may represent a significant difference. However, when the variances within the two groups are larger (i.e., the dispersion of prices within one or both of the groups is greater), then the difference between the weighted-average sale prices of the two groups must be larger in order for the difference to be significant. The Department finds this approach to be reasonable in discerning whether prices differ significantly among purchasers, regions or time periods.

This interpretation is confirmed by language in the SAA, which states that "the Administration intends that in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."<sup>19</sup> The Department's use of the Cohen's  $d$  coefficient in this case is consistent with that conception of industry and patterns of price differences. As described above, the significance of the difference in the means of the prices is dependent on the industry, type of product, as well as the individual respondent's pricing behavior.

Although the price level in the U.S. market is not considered when the Department examines whether there exists a pattern of prices that differ significantly, it is central when examining whether the A-A method cannot account for such differences. In this analysis, the differences in the prices, relative to normal value, are each measured relative to the U.S. sales value. See below for further discussion.

*The Cohen's  $d$  test incorrectly defines comparison groups.*

Electrolux argues that the Cohen's  $d$  test incorrectly defines test groups and comparison groups. Electrolux contends that by rotating each grouping of sales defined by purchaser, region or time period back into the comparison group after testing for pricing differences, the comparison group of sales is ever-changing and does not present a well-defined norm, thus skewing the results of the test. Electrolux further argues that it is "egregious" that a group of sales flagged as passing the Cohen's  $d$  test is returned to the "normal" comparison group of sales to test the next group of sales defined by purchaser/region/time period.

As the Department stated in Shrimp from Vietnam,<sup>20</sup> the purpose of the Cohen's  $d$  test is to evaluate whether sales of comparable merchandise to a particular purchaser, region or time period in each test group exhibit prices that are significantly different from sales to all other purchasers, regions, or time periods, respectively. In other words, each time the Cohen's  $d$  test compares a group of sales defined by purchaser, region or time period, the comparison group of sales must include all other sales reported in the U.S. sales database, regardless of whether they

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<sup>19</sup> See SAA at 843.

<sup>20</sup> The petitioner cites Shrimp from Vietnam, and accompanying Issues and Decision Memorandum at Comment 2; and Activated Carbon.

“Pass” or “Fail” the Cohen’s *d* test or whether they have even been tested yet. It is that universe of sales which serves as the basis for determining whether prices differ significantly, not only the sales that “Fail” the Cohen’s *d* test. Therefore, excluding any sales from the comparison group will skew the universe of sales against which the test group is compared, and the results of the Cohen’s *d* test will be flawed.

In addition, it would be impossible to implement Electrolux’s suggestion to exclude the sales which pass the Cohen’s *d* test from being part of the comparison group. First, when the first comparison is made, the status of all other sales is unknown. Further, whether the sales to particular purchasers, regions or time periods pass or fail will depend on the order in which they are tested and either excluded or included in the comparison group.

The statute directs the Department to examine the significance of price differences among purchasers, regions or time periods. The Department’s methodology does that. The Cohen’s *d* test examines the weighted-average price to each purchaser, region or time period with the weighted-average price for all other sales of comparable merchandise. The Department continues to find that this is a reasonable, transparent and predictable approach to implement the language of the statute and the SAA.

Electrolux also argues that the Cohen’s *d* test can result in irrational findings where all U.S. sales are found to pass the Cohen’s *d* test. The Department disagrees that such a result is irrational. To take a simple example, if there are sales to two purchasers, A and B, and the prices to purchaser A are found to differ significantly from the prices to purchaser B, then it is logical that the prices to purchaser B will also be found to differ significantly from the prices to purchaser A. Contrary to Electrolux, the Department finds that this is a reasonable, sound result for such a situation.

Electrolux further argues that the comparison group should represent the entire universe of sales reported in the U.S. sales database, and should specifically include the test group of sales. We disagree. The inclusion of the test group of sales in the comparison group obviously results in a comparison group that is not independent from the test group. The inclusion of the test group of sales in the comparison group of sales would result in the sales in the test group being compared to themselves which would skew the comparison group toward the group of test sales. A skewed comparison group could then mask any potential price difference that the test group may represent. Therefore, for these final results, we are not adjusting the definition of the comparison groups applied in the Cohen’s *d* test in our preliminary results.

*The Department’s analysis should include an additional test for sales flagged as demonstrating a “pattern of pricing.”*

Electrolux further contends that the Department should add an additional step to its analysis to test the group of sales which pass the Cohen’s *d* test against the sales which do not pass the Cohen’s *d* test. The Department disagrees with Electrolux’s recommendation.

First, the Department is not required by the Act or regulation to retest the aggregated sales that pass the Cohen’s *d* analysis, as such sales have already been found to be at prices that differ

significantly. The Department has established its approach to examine individually the sales to each purchaser, region and time period relative to the sales to all other purchasers, regions or time periods. The Department finds this approach reasonable and consistent with the language of the statute.

Second, although the Department's established approach is to examine the sales to each purchaser, region or time period, this does not preclude grouping sales in some other aggregated or disaggregated manner. In the Preliminary Results, the Department stated "Interested parties may present arguments in relation to the above-described differential pricing approach used in these preliminary results, including arguments for modifying the group definitions used in this proceeding."<sup>21</sup> However, Electrolux made no such argument in this administrative review.

Third, to change the Department's analysis to perform the Cohen's *d* test twice could continue to hide or mask prices that differ significantly in the U.S. market.<sup>22</sup> To follow Electrolux's recommended change, for four individual purchasers, A, B, C and D, the Department would determine whether sales of CONNUM1 to each purchaser are at prices which differ significantly from all other sales of CONNUM 1. Once this analysis is complete, then the sales that pass the Cohen's *d* test (*i.e.*, to purchasers A and C) would be grouped together and the sales that do not pass the Cohen's *d* test (*i.e.*, to purchasers B and D) would be grouped together and then the average price to each group would be tested using a second Cohen's *d* test. However, if the sales to purchaser A were at prices lower than the prices to other purchasers, and the prices to purchaser C were at prices higher than the prices to other purchasers, then test prices would offset one another in the suggested second Cohen's *d* test, such that the prices which differ significantly would continue to hide, or mask, their differences. This is counter to the purpose of the Cohen's *d* test, which is to identify prices that differ significantly among purchasers, regions or time periods, the result of which may lead to conditions (*i.e.*, a pattern) under which masked dumping may exist. Therefore, the Department disagrees with Electrolux's recommended modification to its analysis.

*The Ratio test should not aggregate the results of multiple pricing patterns.*

Electrolux argues that "the statute is looking for a single 'pattern of prices',"<sup>23</sup> whereas the Department has identified "an almost-infinite series of different patterns"<sup>24</sup> which it has simply aggregated in its analysis. The Department agrees that the statute requires a single pattern of prices that differ significantly. However, the Department disagrees that the result of each comparison of the weighted-average price of the sales in a test group with the weighted-average price of the sales in the comparison group in the Cohen's *d* test, in and of itself, represents "a pattern" as provided in the statute. Electrolux misunderstands the purpose and meaning behind both the Cohen's *d* test and the ratio test.

As described in the Preliminary Results, the Cohen's *d* test evaluates whether sales of comparable merchandise to a particular purchaser, region or time period exhibit prices that are

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<sup>21</sup> See Preliminary Results Decision Memorandum at page 7.

<sup>22</sup> See Electrolux's Case Brief at 15-20.

<sup>23</sup> *Id.* at 18.

<sup>24</sup> *Id.*

significantly different from sales to all other purchasers, regions or time periods, respectively.<sup>25</sup> Thus, if the value of the calculated Cohen's *d* coefficient is equal to or greater to 0.8 (i.e., the large threshold), then the prices to a particular purchaser, region or time period in the test group are found to differ significantly from the prices to all other purchasers, regions or time periods, respectively, for comparable merchandise.<sup>26</sup> This analysis was done for each group of comparable merchandise and each purchaser, region or time period in order to identify Electrolux's U.S. sale prices which differed significantly.

The ratio test then aggregates the sales which are at prices that differ significantly (i.e., that pass the Cohen's *d* test) to understand the extent of the significance of the price differences relative to all of the respondent's U.S. sales. From Webster's dictionary,<sup>27</sup> "pattern" has several meanings, including "(8) a reliable sample of traits, acts, tendencies, or other observable characteristics of a person, group, or institution (behavior pattern) (spending pattern)" and "(12) frequent or widespread incidence (a pattern of dissent)."

In the case of identifying a pattern of differing prices, "a pattern" is a reliable sample of traits, acts, tendencies or other observable characteristics, with frequent or widespread incidences. As described above, the ratio test quantifies the extent of the significant differences which have been identified by the Cohen's *d* test. The Department finds that this definition of "pattern" supports the Department's approach.

Electrolux appears to confuse the purpose of the results of the Cohen's *d* test and the ratio test. Electrolux states:

Thus, the output generated by the Department's differential pricing analysis for a given CONNUM reflects, allegedly, "... a pattern of prices ...." However, the Department's construction of the two final groups "PASS" and "FAIL" involves not a single pattern but rather a series of sequential, different patterns.<sup>28</sup>

As stated above, the results of the Cohen's *d* test determine whether the sales in the test group are at prices which differ significantly from the prices in the comparison group of sales. Both the test group and the comparison group are composed of multiple U.S. sales with individual prices; these are not the patterns to which the Act refers. The Act refers to "a" single pattern for the respondent. This pattern is manifested to the extent that prices for comparable merchandise differ significantly among purchasers, regions or time periods. The Department's Cohen's *d* and ratio tests are consistent with this idea of "a" single pattern found in the language of the Act.

In addition, Electrolux proposes a "solution" to its perceived "failure" of the Department to identify a singular pattern. Under this approach, the Department would aggregate the results of the Cohen's *d* test into two groups, one which includes sales which pass the Cohen's *d* test and a second which includes sales which do not pass the Cohen's *d* test, and then conduct a second-

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<sup>25</sup> See Preliminary Results Decision Memorandum at 6.

<sup>26</sup> *Id.* ("For this analysis, the difference was considered significant, and the sales in the test group were found to pass the Cohen's *d* test, if the calculated Cohen's *d* coefficient is equal to or exceeds the large (i.e., 0.8 threshold).")

<sup>27</sup> See Webster's Ninth New Collegiate Dictionary (1989) at pages 863-864.

<sup>28</sup> See Electrolux's Case Brief at 18.

level Cohen's *d* test on these two groups of sales to determine whether a "pattern of prices" exists. We do not believe that this approach would be reasonable.

Notwithstanding Electrolux's argument against the Department's aggregation of the "almost-infinite series of different patterns," Electrolux returns to its suggested approach above of comparing all sale prices which "PASS" the Cohen's *d* test with all sale prices which "FAIL" the Cohen's *d* test, where these two groups are the same aggregation to which Electrolux has objected here. Electrolux fails to explain this contradiction in logic. In addition, the Department explained in the preceding comment why Electrolux's approach of comparing all sales which "PASS" with all sales which "FAIL" is not appropriate,<sup>29</sup> even if Electrolux did not object to aggregating an "almost-infinite series of different patterns." Furthermore, Electrolux's proposed analysis does not consider price differences among purchasers, among regions, or among time periods, but rather considers the price differences between two groups (*i.e.*, the "PASS" and "FAIL" groups) which are a mish-mash of sale prices to different purchasers, regions and time periods compared with a residual mish-mash of sale prices to other purchasers, regions and time periods. Such an approach is nonsensical and inconsistent with the language of the Act.

Accordingly, the Department continues to disagree with Electrolux's argument that that Department should not aggregate the results of the Cohen's *d* test when examining the pattern requirement.

*Explanation of why the A-A method cannot account for such pricing differences.*

Finally, we disagree with Electrolux's assertion that the Department failed to explain why the significant pattern of price differences cannot be accounted for when using the A-A method, pursuant to section 777A(d)(1)(B)(ii) of the Act. Section 777A(d)(1)(B)(i) of the Act, the "pattern" requirement, requires that the Department examine whether there exists a pattern of prices that differ significantly among purchasers, regions or time periods. The Department considers whether the respondent's pricing behavior has created conditions in the U.S. market in which dumping may be "targeted" or masked. This is the result of higher U.S. prices offsetting lower U.S. prices where the dumping which may be found on lower-priced U.S. sales is hidden by the higher U.S. prices, such that the A-A method would be unable to account for such conditions. This relationship is specifically recognized in the SAA as where "an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."<sup>30</sup> The SAA states that consideration of the A-T method, as an alternative comparison method, is in response to such concerns, and that this is "where targeted dumping *may* be occurring."<sup>31</sup>

Section 777A(d)(1)(B)(ii) of the Act, the "explanation" requirement, then requires the Department to explain why the A-A method cannot account for "such differences," *i.e.*, the conditions identified in the "pattern" requirement which may lead to hidden or masked dumping.

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<sup>29</sup> Electrolux' previously addressed example included only a single product sold to only four different purchasers and not its entire U.S. sales data which include many groups of comparison merchandise with multiple purchasers, regions and time periods..

<sup>30</sup> See SAA at 842.

<sup>31</sup> *Id.* at 843 (emphasis added).

To consider this requirement, the Department uses a “meaningful difference” test where it compares the weighted-average dumping margin calculated using the A-A method only and the weighted-average dumping margin calculated using an appropriate alternative comparison method based on the application of the A-T method. 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 export or constructed export prices with normal values which determine whether there is a meaningful difference in these two results.

When using the A-A method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by higher-priced U.S. sales. This is reflected in the SAA, which states that “targeted dumping” is a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”<sup>32</sup> The comparison of a dumping margin based on a weighted-average U.S. price with a dumping margin based on the individual, constituent transaction-specific U.S. prices precisely examines the impact of the amount of dumping which is hidden or masked. Both the weighted-average U.S. price and the individual U.S. prices are compared to a normal value that is independent and constant because the characteristics of the individual U.S. sales 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 and the A-T method. The normal value used to calculate a dumping margin for these sales may fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

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

Under scenarios (1) and (2), either there is no dumping or all U.S. sales are dumped, such that there is no difference between the A-A method with offsets and the A-T method with zeroing – *i.e.*, there is no meaningful difference. 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, and again there is no meaningful difference between the results of the two comparison methods. 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.*, there is less than a 25 percent relative change and no crossing of the de minimis threshold) calculated using the A-A and A-T method. 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

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<sup>32</sup> *Id.* at 842.

a meaningful difference in the weighted-average dumping margins calculated using the A-A and A-T methods (i.e., there is at least a 25 percent relative change in the dumping margin or there is a crossing of the de minimis threshold).

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 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 change by at least 25 percent or the weighted-average dumping margin cross the de minimis threshold.

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 normal value must fall within an even narrower range of values (i.e., narrower than the price differences exhibited in the U.S. market) such that the limiting circumstances are present (i.e., scenario (5) above). This required fact pattern must then be repeated across 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 this set of circumstances, the “meaningfulness” of the difference in the weighted-average dumping margins between the two comparison methods will be diluted. Thus, the Department disagrees with Electrolux’s claim that the Department has failed to adequately explain why the A-A method cannot account for such differences.

Further, 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.

In sum, we met the requirement of an “explanation,” as set forth under section 777(A)(d)(1)(B)(ii) of the Act.

## **Comment 2: Zeroing**

Electrolux asserts that Article 2.4.2 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (AD Agreement) prohibits the Department from

zeroing when making A-T comparisons in administrative reviews.<sup>33</sup> According to Electrolux, the application of zeroing based on the use of the A-T comparison methodology violates prior WTO Appellate Body and Panel decisions and should be rejected by the Department.

The petitioner responds that zeroing when applying the A-T methodology is lawful and consistent with the United States' international obligations.<sup>34</sup> The petitioner asserts that there are no decisions by the Appellate Body or WTO panels addressing the use of zeroing when applying section 777A of the Act, which corresponds to the second sentence of Article 2.4.2 of the AD Agreement.<sup>35</sup> According to the petitioner, if zeroing is prohibited in both the A-A and A-T comparison methodologies, then both methodologies will always yield identical results in terms of the total amount of dumping and the weighted-average dumping margin. The petitioner notes further that the CAFC has held that zeroing is legal under U.S. law.<sup>36</sup> In fact, the petitioner alleges that 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 negative dumping margins and not permit them to eliminate positive dumping margins when the Department has found that a pattern of significant price differences among customers, regions, or periods of time exists.

#### The Department's Position:

The Department disagrees with Electrolux's claim that the Department's practice of zeroing when applying the A-T methodology is inconsistent with its WTO obligations and unlawful.

The CAFC has affirmed the Department's practice of denying offsets for non-dumped sales when using the A-T method.<sup>37</sup> Accordingly, the Department's practice is lawful.

With respect to the United States' WTO obligations, to date the WTO Dispute Settlement Body has not adopted a panel or Appellate Body decision which addressed the use of an alternative comparison methodology or the denial of offsets for non-dumped transactions pursuant to section 777A(d)(1)(B) of the Act or the second sentence of Article 2.4.2 of the AD Agreement. Each of the WTO panel or Appellate Body reports finding that the United States had not fulfilled its obligations under the AD Agreement by denying offsets for non-dumped transactions involved provisions other than the second sentence of Article 2.4.2 of the AD Agreement. The United

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<sup>33</sup> In support of its assertion, Electrolux cites numerous WTO Appellate Body and Panel decisions at pages 1-4 of its case brief.

<sup>34</sup> See Petitioner's Case Rebuttal Brief at 16.

<sup>35</sup> See, e.g., US-Stainless Steel (Mexico) (AB), para. 127. See also US-Zeroing (Japan) (AB), paras. 135-136 (distinguishing the T-T and A-T methodologies and declining to further address whether zeroing is permitted under the second sentence of Article 2.4.2 when applying the A-T comparison methodology).

<sup>36</sup> The petitioner cites 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) (U.S. Steel Corp.). See Petitioner's Rebuttal Brief at page 17-18.

<sup>37</sup> See Union Steel, 713 F.3d 1101, 1103 (Fed. Cir. 2013).

States has fully implemented these decisions pursuant to the requirements established by the URAA.<sup>38</sup>

As we stated recently in Wood Flooring,<sup>39</sup> the decision by the CAFC in Union Steel resolved the outstanding question of whether the Department’s statutory interpretation is reasonable. The CAFC affirmed the Department’s explanation that it may interpret the statute to permit the denial of offsets for non-dumped sales with respect to the A-T comparison method in administrative reviews, while permitting the Department to grant offsets for non-dumped transactions when applying the A-A comparison method in investigations. The CAFC also affirmed the Department’s explanation that it may interpret the same statutory provision differently because there are inherent differences between the comparison methods used in investigations and reviews. Indeed, the CAFC noted that although the Department recently modified its practice “to allow for offsets when making A-A comparisons in administrative reviews . . . {t}his modification does not foreclose the possibility of using the zeroing methodology when {the Department} employs a different comparison method to address masked dumping concerns.”<sup>40</sup> Likewise, in U.S. 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.<sup>41</sup>

The Department’s application of the “mixed alternative methodology” in calculating Electrolux’s weighted-average dumping margin in these amended final results 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.<sup>42</sup> As the CAFC held in U.S. Steel Corp., courts “defer to Commerce’s reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by ‘the agency’s generally conferred authority and other statutory circumstances.’”<sup>43</sup> Such a “gap” exists with respect to the appropriate manner for the Department to account for masked dumping concerns in antidumping administrative reviews, as the CAFC recently recognized in JBF RAK.<sup>44</sup> Moreover, when the Department exercises its technical expertise to select and apply methodologies to implement the dictates of the trade statute—in this case the statute’s authorization to use the A-T method—

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<sup>38</sup> See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006); and 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).

<sup>39</sup> Multilayered Wood Flooring From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Final Results of New Shipper Review; 2012-2013, 80 FR 41476 (July 15, 2015) (Wood Flooring), and accompanying Issues and Decision Memorandum at Comment 1.B.

<sup>40</sup> See Union Steel, 713 F.3d at 1106.

<sup>41</sup> See U.S. Steel Corp. 621 F.3d. at 1351 and 1363 (recognizing that the use of the A-T method with zeroing would combat “targeted or masked dumping”).

<sup>42</sup> See U.S. Steel Corp., 621 F.3d at 1357

<sup>43</sup> Id. (citations omitted).

<sup>44</sup> JBF RAK, 790 F.3d at 1364 (holding that the Department’s application of A-T method in an administrative review “properly” filled the gap Congress left in the statute).

courts afford the Department “tremendous deference” that is “both greater than and distinct from that accorded the agency in interpreting the statutes it administers.”<sup>45</sup>

Here, if the Department were to offset positive A-T comparison results with negative A-A comparison results (i.e., non-dumped sales) as Electrolux 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 and be unreasonable.

The Department reasonably aggregated the results of each of these distinct comparison methods in calculating Electrolux’s weighted-average dumping margin, 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 Electrolux 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.

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

**RECOMMENDATION**

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

✓  
\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

  
\_\_\_\_\_  
Christian Marsh  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

10/30/15  
\_\_\_\_\_  
(Date)

<sup>45</sup> Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (Fujitsu); PSC VSMPO-Avisma Corp. v. United States, 688 F.3d 751, 764 (Fed. Cir. 2012) (quoting Fujitsu).