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October 10, 2008

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Antidumping Investigation of Sodium Metal from France

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SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the antidumping investigation of sodium metal from France. The petitioner is E.I. DuPont de Nemours & Co. Inc., and the respondent is MSSA S.A.S. and its U.S. affiliates MSSA Co. and Columbia Sales International ("CSI"), (collectively "MSSA"). The period of investigation ("POI") covers October 1, 2006, through September 30, 2007. As a result of our analysis, we have made changes to the margin calculation. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comments and rebuttal comments by parties:

ISSUES

Comment 1: Whether the Department Should Include "Form" As Part of Model Match Criteria

Comment 2: Whether the Department Should Calculate the Antidumping Duty Margin using the Transaction-to-Transaction Methodology

Comment 3: Whether the Department's Targeted Dumping Test is Flawed and Should be Replaced with the "preponderance at two percent test" ("P/2 test")

Comment 4: Whether the Department Should Alter Its Level of Trade Analysis

Comment 5: Whether the Department Should Calculate Certain Home Market Packing Expenses Based on Facts Available

Comment 6: Whether the Department Should Re-allocate Indirect Selling Expenses Based on Sales Value

Comment 7: Whether the Department Should Deduct Freight from Transfer Price Before Calculating Domestic Indirect Selling Expenses

Comment 8: Whether the Department Should Correct MSSA Co.'s Inventory Carrying Costs in the United States

Comment 9: Whether the Department Incorrectly Characterized MSSA Co.'s Quantity and Value Reconciliation

Comment 10: Whether the Department Correctly Calculated Indirect Selling Expenses Incurred in the Home Market for Purposes of the CEP Deduction

Comment 11: Whether the Department Should Consider Certain Expenses Reported as Indirect Selling Expenses as Direct Deductions from the U.S. Price

Discussion of the Issues

Comment 1: Whether the Department Should Include "Form" As Part of Model Match Criteria

The petitioner argues that the model match should be limited to calcium, potassium, chloride/bromide, and oxygen, which identify the grade of sodium metal. The petitioner argued in its previous comments to the Department that form should not be part of the matching control number. See Petitioner's Comments on MSSA's Suggestions for Model Matches, dated December 17, 2007, at pages 1-3. The petitioner further argues that the evidence of record refutes MSSA's submission on December 19, 2007, stating that form is an important part of model match because of the enormous cost difference, enormous price difference, and fundamental difference between bulk sodium, ingot, sticks, and doses.

The petitioner claims that the difference in variable cost for each control number is insignificant regardless of which packaging is used (i.e., bulk, ingot, sticks, and doses). The petitioner cites to the cost buildup worksheets of the Department's Cost Verification Report, from Lavonne Clark to the File, dated July 1, 2008, at 21 ("Cost Verification Report"). Furthermore, the petitioner explains that it focuses on the variable cost because the Department uses the variable cost to determine any difference in merchandise adjustment. However, the petitioner states that the differences in cost are still insignificant even if the Department considers the total cost of manufacture.

The petitioner asserts that the introduction of packaging as a factor negates the difference in merchandise adjustment made to normal value ("NV"). The petitioner reasons that the difference in packaging materials accounts for cost differences related to the matching criterion "form." Furthermore, the petitioner believes any difference in merchandise adjustment between similar products would not be reasonable. See 19 CFR 351.411(b).

The petitioner maintains that "form," one of the Department's matching criteria, is simply a different way to package sodium metal. The petitioner states that MSSA calculated a separate expense for each packing type, which fully captures the alleged cost differences among packing

types. The petitioner states that the Department's antidumping methodology adjusts for cost differences by subtracting home market packing from NV and adding U.S. packing to it.

The petitioner also argues that the evidence confirms that bulk sodium metal is not fundamentally different from ingot, stick or dose sodium metal. The petitioner points to pages 12-14 of the Cost Verification Report where the Department describes its examination of each production operation and process associated with the manufacture of sodium metal. The petitioner notes that only some of the operations are strictly related to the packaging of sodium metal which confirms that different types of packaging are not important enough to be distinguished in the Department's model match methodology.

Finally, the petitioner contends that the form (bulk, ingots, sticks, and doses) is nothing more than a method of delivery. The petitioner argues that a customer's request for delivery of a specific grade of sodium metal as ingots rather than as bulk is not comparable to the difference between steel wire rod and molten steel, sheet, plate or bar. The petitioner states that the various forms of sodium metal can be used as a substitute for one another. Therefore, the petitioner argues that the Department should remove "form" from the model match methodology.

MSSA maintains that formation of sodium metal into shapes such as ingots, sticks, and doses gives a special physical characteristic just as forming molten steel into sheets, plates, wire rod, or bar constitutes a physical characteristic. See MSSA's letter concerning matching criteria, dated December 19, 2007. MSSA also argues that pasta is another product where the Department considers form as part of the model matching criteria. As for sodium metal, MSSA explains that functionally an ingot customer cannot use bulk sodium and a sodium customer cannot use ingots and vice versa. See Sodium Metal From France, Inv. No. 731-TA-1135 (Preliminary), USITC Pub. 3793 (Dec. 2007), at II-2.

MSSA argues that the Department verified on its plant tours that ingots, sticks, and doses are all produced in separate areas of the plant. MSSA contends the petitioner's descriptions of the production steps are not accurate. MSSA points to the Cost Verification Report which notes that "the yield losses associated with the processes used to change the form of the sodium metal are used to distinguish costs among control numbers with different forms." See Cost Verification Report at 32. MSSA claims that the petitioner is trying to re-define certain production steps by calling them "strictly packaging" and characterizing them as an insignificant operation merely because the Cost Verification Report characterized the costs associated with the steps as insignificant. MSSA argues that the cost difference is only one of several criteria the Department considers as well as actual physical differences and differences in prices. See New World Pasta Co. v. United States, 316 F. Supp. 2d 1338, 1354 (CIT 2004) ("New World Pasta"). Furthermore, MSSA claims that the petitioner only focuses on the variable costs, and not the total costs that distinguish bulk from ingots, sticks, and doses of the same grade. MSSA cites Cost Verification Exhibit 9 to demonstrate that there is a difference in costs when fixed costs are included in the comparison of grades.

Finally, MSSA argues that that the price differences of bulk sodium, ingots, sticks, and doses vary considerably. MSSA compared the weighted-average price difference between control numbers with the same first four physical characteristics but with different form. The data demonstrate significant price differences that confirm that the actual physical differences among bulk, ingots, sticks, and doses are significant.

The Department's Position:

The Department will continue to treat form as a physical characteristic for matching U.S. sales to NV. Congress has delegated to the Department the ability to choose product matching criteria to identify the foreign like product to which domestic sales are compared in order to calculate the dumping margin. See New World Pasta, 316 F. Supp. 2d at 1352. In accordance with section 771(16) of the Tariff Act of 1930, as amended ("the Act"), the Department uses physical characteristics to define identical or similar merchandise in the margin calculation. Although the Department has stated that price differences and cost differences which may reflect different production processes define the significance of a physical characteristic, the U.S. Court of International Trade has recognized that "the statute does not require that physical characteristics be significant and, generally, Commerce has wide latitude in choosing what physical characteristics to consider." See New World Pasta, 316 F. Supp. 2d at 1354 (citing Pesquera Mares Australes, Ltda. v. United States, 266 F.3d 1372 at 1372, 1384 (Fed. Cir.)). Therefore, the petitioner's claim that the variable cost is insignificant does not have a direct bearing on the choice of physical characteristic. In other words, the significance or insignificance of the difference in variable cost does not determine the matching criteria.

With regard to the term "reasonableness" in 19 CFR 351.411(b), the term reasonableness refers to the Department's 20 percent difference in merchandise guideline. For example, in Certain Forged Stainless Steel Flanges From India; Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind Administrative Review in Part, 73 FR 11863, 11864 (March 5, 2008), and Certain Forged Stainless Steel Flanges from India; Final Results of Antidumping Duty Administrative Review and Rescission in Part, 73 FR 30881 (May 29, 2008) the Department states:

> The Department used a 20 percent difference-in-merchandise (difmer) cost deviation cap as the maximum difference in cost allowable for similar merchandise, which we calculated as the absolute value of the difference between the U.S. and comparison market variable costs of manufacturing divided by the total cost of manufacturing of the U.S. product. See 19 CFR 351.411. Variable cost of manufacture consisted of the sum of material costs, direct labor, and variable overhead. Total cost of manufacture consisted of variable cost of manufacture plus fixed overhead.
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> Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics and reporting instructions listed in the Department's questionnaire. Where there were no sales of identical or similar merchandise in its home market suitable for comparing to U.S. sales, the Department compared these U.S. sales to constructed value.

The guideline is not a test to determine the physical difference and a difference in merchandise adjustment would be made when a U.S. sale is matched to similar merchandise in the home market.

As noted above, the Department has used form as a physical characteristic in numerous cases to match subject merchandise to the foreign like product. Pasta is an example of a product where

the Department has included form as a physical characteristic for matching purposes. See Certain Pasta from Italy; Notice of Preliminary Results and Partial Rescission of Tenth Antidumping Duty Administrative Review, 72 FR 44082, 44083 (August 7, 2007), and Certain Pasta from Italy: Notice of Final Results of the Tenth Administrative Review and Partial Rescission of Review, 72 FR 70298 (December 11, 2007). In the pasta case, the pasta is formed into long cuts, specialty long cuts, nested/folded/coiled, lasagna, short cuts, specialty short cuts, and soupettes. As for sodium metal, MSSA produces sodium metal in the form of bulk, ingots, sticks, and doses, which are physical characteristics, and are not simply a way to pack the product.

Finally, as MSSA explains in its December 13, 2007, submission concerning model match criteria, bulk sodium metal is further processed into solid-shape ingots, sticks, and doses. Each of the forms reported by MSSA represents different sizes, shapes, and weights depending on the form of the sodium metal. In Exhibit 2 of its December 13, 2007, submission, MSSA states the following:

> The ingots and sticks produced by Metaux Speciaux have no equivalent on the market. These are produced by extrusion and are entirely different from those obtained by a molding process. From 12 g to 7 kg, an infinite variety of weights, sizes and forms are offered. There is certainly a size or shape perfectly adopted to the needs of any consumer.

In addition, MSSA explains that certain forms are sold to specific customers. We reviewed the production flowcharts for MSSA and toured the production facility. In addition, we reviewed the steps necessary to manufacture each product produced at MSSA S.A.S. Our observations and inquiries regarding the production process were consistent with the reported information. See Sales Verification Report, from Dennis McClure and Joy Zhang, dated July 18, 2008, at 12 ("Sales Verification Report"). Therefore, we note that bulk, ingots, sticks, and doses are physically different forms of sodium metal.

Comment 2: Whether the Department Should Calculate the Antidumping Duty Margin using the Transaction-to-Transaction Methodology

The petitioner cites section 777A(d)(1)(A)(i)-(ii) of the Act stating that the Department can either compare weighted average NVs to the weighted average of the constructed export prices ("CEP") or compare NVs of individual transactions to individual CEP transactions. The petitioner contends that the Statement of Administrative Action ("SAA") at 842-43 and In the Matter of Sales at Less Than Fair Value of Certain Softwood Lumber from Canada, Remand Redetermination, Secretariat File No. USA-CDA-2002-1904-02 (July 11, 2005) at 11 ("Softwood Lumber Remand"), in fact, support the application of the transaction-to-transaction comparison method.

The petitioner claims that the price variability of subject merchandise to customers distinguishes this case from the norm as in the Softwood Lumber Remand. The petitioner reasons that price variability is evident in MSSA's targeting of customers and the average-to-average comparison methodology masks dumping in the margin calculation. The petitioner explains that its targeted

dumping analysis based on the P/2 test would show that there is targeting which should lead the Department to use the transaction-to-transaction comparison methodology.

The petitioner provides analysis plotting the relative frequency of the sales quantities at the range of prices against the net U.S. price without U.S. packing expenses. In its analysis, it plotted a graph based on the distribution of prices for a specific control number. In its argument, the petitioner asserts that dumping of large quantities of sodium metal at the lowest prices sold to non-targeted customers is masked by the non-dumped sales of smaller quantities at higher prices to targeted customers. Furthermore, the petitioner plots the prices for all U.S. sales with prices to targeted customers and non-targeted customers. The petitioner argues that the wide variability in net U.S. prices can serve to mask dumping, and the Department should apply the transaction-to-transaction method for calculating margins.

Next, the petitioner states that it determined the best home market match for each MSSA U.S. sale based on the matching criteria set forth in the Softwood Lumber Remand. The petitioner argues that MSSA's database is small enough to allow the Department to calculate the margin based on transaction-to-transaction matching with respect to the criteria set forth in the Softwood Lumber Remand at 15-16, which are: (1) model match characteristics (control number); (2) same level of trade ("LOT"); (3) closest date of sale; (4) least difference in cost of manufacture; (5) most similar quantity; (6) channels of distribution; (7) most similar total movement expense; (8) number of days between shipment and payment; and (9) arbitrary choice of first among equals. However, in this case, the petitioner gave the best match a wider range of dates because it contends that price volatility is not as important a consideration. See Softwood Lumber Remand at 14-15. The petitioner chose to use the least difference in the variable cost of manufacture; the most similar quantity; and the number of days between shipment and payment.

Finally, the petitioner points to the Softwood Lumber Remand at 11. The petitioner argues that the Department's practice of calculating antidumping margins using a weighted-average methodology, in investigations, was based upon the practice of not allowing an offset for non-dumped sales. Therefore, as noted in the Softwood Lumber Remand at 12, the petitioner argues that it is not clear whether or not the stated preference at the time of the SAA and regulations should continue to apply. The petitioner argues that the evidence supports the application of the transaction-to-transaction method and that it has demonstrated the feasibility of this method. Furthermore, the petitioner argues that the Department should apply the matching criteria discussed above.

MSSA argues that the petitioner failed to show how it calculated net prices in its analysis used to show that dumping is masked. Moreover, MSSA states that it appears the petitioner has based its analysis on a collapsed control number, which MSSA does not believe to be reasonable. Furthermore, MSSA argues that the petitioner failed to provide information to the Department showing how it calculated pattern and significant difference requirements. MSSA argues that the Department should reject the petitioner's analysis because it failed to provide adequate evidence showing that targeted dumping exists.

MSSA contends that the Department's preference is to use the average-to-average methodology and that the Department will use the transaction-to-transaction method only in "unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." See 19 CFR 351.414(c)(1).

MSSA claims that the petitioner does not demonstrate that there are very few sales or the merchandise is identical or very similar in each market.

MSSA argues that the petitioner's claim is based on price variability to customers and not the examples given in accordance with 19 CFR 351.414(c)(1). See Petitioner's Case Brief at 12. Furthermore, MSSA contends that the petitioner confuses price volatility over time with price variability among MSSA's customers. MSSA points to the Softwood Lumber Remand at 9, which refers to volatility as "the extent that the sales volume of a particular product varies over time and between the markets, the weighted-average price of any particular product could be skewed toward a period of low prices in one market and toward a period of high prices in the other market."

Furthermore, MSSA argues that market conditions for sodium metal are entirely different from market conditions for softwood lumber, which makes a transaction-to-transaction comparison totally inappropriate. MSSA contends that the sodium metal market is dominated by long-term contracts with prices fixed over long periods of time, whereas the softwood lumber market varied wildly over time and necessitated more contemporaneous home market matches which justified a transaction-to-transaction approach. MSSA contends that the petitioner's analysis does not show that U.S. prices vary wildly over time, only that prices may vary by form. Therefore, MSSA asserts that there is no need for the Department to depart from the normal weighted-average methodology in favor of a transaction-to-transaction methodology.

The Department's Position:

For the reasons below, we have not used the transaction-to-transaction comparison methodology and have continued to use the weighted average-to-weighted average comparison methodology. As stated in CFS Paper from Korea, section 777A(d)(1)(A) of the Act sets forth the general rule that the weighted average-to-weighted average methodology or the transaction-to-transaction methodology normally will be employed in antidumping investigations to calculate antidumping duty margins. See Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea, 72 FR 60630 (October 25, 2007), and accompanying Issues and Decision Memorandum at Comment 5 ("CFS Paper from Korea").

However, as also noted in CFS Paper from Korea and Softwood Lumber Remand, the Department's regulations at 19 CFR 351.414(c)(1) explain that the transaction-to-transaction methodology will only be employed in unusual situations. Moreover, the Softwood Lumber Remand was not affected because the panel dismissed the case. See Decision of the Panel Respecting Motions to Dismiss, In The Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Less Than Fair Value Sales Determination, USA-CDA-2002-1904-02. In addition, the SAA provides guidance by explaining that the Department will employ the transaction-to-transaction methodology "far less frequently" than the weighted average-to-weighted average methodology given the agency's "past experience with this methodology" and the "difficulty in selecting appropriate comparison transactions." See SAA at 842-43. The SAA further elaborates that the transaction-to-transaction methodology would be appropriate where "there are very few sales and the merchandise sold in each market is identical or very similar or is custom made." See SAA at 842.

In this case, none of these unusual situations are present (i.e., there are a large number of sales and the product is not "custom made"). With respect to the use of the transaction-to-transaction methodology in Softwood Lumber Remand, the Department determined, "among other things, the volatility of prices of subject merchandise and of the product sold in Canada during the POI distinguishes this case from the norm." See Softwood Lumber Remand at 11. In this case, the petitioner has not shown price volatility over time, as was the case in Softwood Lumber Remand, only between customers. The petitioner confuses price variability associated with sales to customers which it considers to be targeted with price volatility over time.

Finally, in regard to the use of the P/2 test, the Department explains in Comment 3 why it believes that the P/2 test is not appropriate for determining whether there is targeted dumping. The Department explains that we are applying a new targeted dumping standard and methodology for analyzing targeted dumping allegations. Therefore, we have applied the Nails Test as explained below. We found that no targeted dumping exists in our analysis.

Comment 3: Whether the Department's Targeted Dumping Test is Flawed and Should be Replaced with the "preponderance at two percent test" ("P/2 test")

The petitioner argues that the Department should apply its targeted dumping methodology to all of MSSA's sales based on the P/2 test, instead of the Department's new test, if the Department does not use the transaction-to-transaction method of matching sales. The petitioner incorporates by reference the June 23, 2008, comments submitted by the Committee to Support U.S. Trade Laws ("CSUSTL Comments"). The petitioner also cites to the June 23, 2008, comments submitted by Kelley Drye & Warren LLP, and Stewart and Stewart in response to the Department's request for comments. See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations, Request for Comments, 73 FR 26371 (May 9, 2008) ("TD Methodology"). The petitioner asserts that the new test cannot detect obvious patterns of targeting; unlawfully allows high-priced sales to mask targeting; and eliminates most sales from consideration before testing for a pattern or a significant difference in price. The petitioner claims that there is a pattern of CEPs for comparable merchandise that differ significantly among purchasers and periods of time which cannot be taken into account using the average-to-average method. Therefore, in accordance with 19 CFR 351.414(e), the petitioner requests the Department to apply the average-to-transaction method to all sales if the Department does not use the transaction-to-transaction method.

The petitioner states that the Department should continue to follow the P/2 test used in the antidumping duty investigation of coated free sheet paper from South Korea, until the criticism of its new test is completely answered. The petitioner explains that the P/2 test finds targeted dumping when the weighted-average net price to a non-targeted group is at least two percent lower than the weighted-average net price to a non-targeted group in control number per month combinations representing a preponderance of the targeted quantity. The petitioner cites to the Department's September 10, 2007, Memorandum from Stephen J. Claeys to David M. Spooner, in CFS Paper from Korea, where the Department responds to the allegation of targeted dumping in that case. Further, the petitioner cites comments in support of the P/2 test from the Committee to Support U.S. Trade Laws and United States Steel Corporation on December 10, 2007. Therefore, the petitioner states that the Department should use the P/2 test because it is well recognized and relevant to the sodium metal industry.

The petitioner resubmitted its targeted dumping analysis based on MSSA's updated U.S. sales database submitted to the Department after verification. The petitioner states that targeted dumping exists because a comparison of the targeted to non-targeted net weighted-average price showed that the targeted group was at least two percent lower than the weighted-average of the non-targeted group. Furthermore, the petitioner claims that the targeted sales volume is greater than the non-targeted sales volume, which is another indication of targeted dumping. See Exhibit 3 of the petitioner's case brief for the results of their P/2 analysis.

Finally, the petitioner argues that although the Department's regulations state that its normal practice is to limit the average-to-transaction methodology where targeted dumping has been found, the Department should apply the average-to-transaction methodology to all sales. See 19 CFR 351.414(f)(2). The petitioner claims that a significant percent of MSSA's U.S. sales involve targeted dumping. Therefore, the petitioner argues that all sales should be calculated using the average-to-transaction methodology given the pervasive nature of MSSA's targeted dumping practice. See Antidumping Duties; Countervailing Duties, Final Rule, 62 FR 27296, 27375 (May 19, 1997).

MSSA argues that there is no reason for the Department to revert to the P/2 test, because the Department has already replaced the test. MSSA cites Post-Preliminary Determinations On Targeted Dumping, Antidumping Duty Investigations Of Certain Steel Nails From The Republic of China (PRC) and The United Arab Emirates (UAE) (April 21, 2008) ("Post-Preliminary Determination of Nails"). MSSA states that the petitioners in the nails investigation also argued that the Department should use the P/2 test in the nails investigation. However, MSSA explains that the Department developed a two-stage analysis that relies on valid statistical techniques used to address the pattern requirement and the significant difference requirement. See id. at 8. Therefore, MSSA asserts given that there were methodological flaws in the P/2 test, the Department should continue to apply the new Nails Test.

The Department's Position:

In its Post-Preliminary Determination of Nails, the Department explained that the first stage of the new two-stage targeted dumping test utilizes a standard deviation test, where (in the case of customer targeting) the Department determines the share of the alleged target's purchases of identical merchandise that were at prices more than one standard deviation below the price of that identical merchandise to all customers ("market average"). All prices are CONNUM-specific and weight-averaged over the POI, and the market average price reflects purchases by all customers. If the total sales that met the standard deviation test exceed 33 percent of the total sales to the alleged target of the identical merchandise, then the first stage of the targeted dumping test, the pattern requirement, is met. See Post-Preliminary Determination of Nails at 8.

In the second stage of the test, as described in the Post-Preliminary Determination of Nails, the Department utilizes a price gap test, which examines all the sales of identical merchandise that meet the pattern requirement and determines the sales for which the difference between the price to the alleged target and the next highest price to a non-target exceeds the price gap observed in the non-targeted group. For these sales, the significant difference requirement is met. If the share of these sales exceeds five percent of the total sales to the alleged target of the identical merchandise, then the Department determines that targeted dumping has occurred. See Post-Preliminary Determination of Nails at 8.

For the Nails final determination, we revised our targeted dumping methodology so that the sales-weighted standard deviation, price gaps and price averages are calculated on the basis of sales volume, not value, and the 33 percent and 5 percent thresholds are evaluated on that basis as well. See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008), and accompanying Issues and Decision Memorandum ("Nails from the PRC") at Comments 3 and 5.

We disagree with the petitioner's contention that the Department should apply its targeted dumping methodology to all of MSSA's sales based on the P/2 test. As explained in the investigation of certain steel nails from the People's Republic of China, "the Department signaled its intention to develop a standardized targeted dumping test to replace the P/2 test for application in subsequent investigations." See Nails from the PRC at Comment 1. Furthermore, as noted in CFS Paper from Korea, the Department emphasized that it was not "endorsing the petitioner's test standards and procedures as a general practice." See CFS Paper from Korea at Comment 2. Likewise, in this case, the Department accepted the petitioner's targeted dumping allegation based on the P/2 test but explained that we would apply a new targeted dumping standard and methodology for analyzing targeted dumping allegations. See Sodium Metal from France: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 30605, 30606 (May 28, 2008). Moreover, the Department has already stated in CFS Paper from Korea that it was not establishing the P/2 test as precedent for targeted dumping analysis. See CFS Paper from Korea at Comment 2. Since the Department has found no targeted dumping by MSSA, the petitioner's point about the scope of application of average-to-transaction price comparisons is moot.

In developing its new targeted dumping analysis methodology, the Department is still in the process of analyzing comments, including comments submitted by the Committee to Support U.S. Trade Laws and United States Steel Corporation which were received in the Department's request for comment on TD Methodology. Therefore, we have not incorporated changes to the targeted dumping methodology based on comments received in response to the TD Methodology for this final determination. Moreover, the petitioner has only identified certain issues from the CSUSTL Comments as "applicable to this investigation." See the petitioner's case brief at page 17. Thus, we have only addressed those issues here. We note that although the CSUSTL Comments (in the context of those issues identified by the petitioner as applicable to this investigation) comment on the Department's use of a standard deviation in its targeted dumping methodology, because the petitioner does not discuss the Department's use of a standard deviation in its case brief, we are not addressing that comment in this final determination.

We disagree with the petitioner that the new test cannot detect obvious patterns of targeting. The standard deviation test uses a measurement common in statistical analysis to provide an appropriate and balanced threshold for identifying a pattern, and the gap test provides a reasonable threshold for identifying significant price differences. The two-percent price difference threshold advocated by the petitioner does not account for price variations specific to the market in question. Additionally, the P/2 test collapses the pattern and significant price difference requirements of the statute. As a result, the P/2 test predetermines which sales are targeted (again, without any reference to the extent of price dispersion in the market) and may

therefore find targeted dumping in many cases when arguably no such dumping is occurring. Thus, we do not find the results of the P/2 test to be a reliable indicator that "obvious" targeted dumping has occurred, as the petitioner claims. See Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008), and accompanying Issues and Decision Memorandum ("Nails from the UAE") at Comment 7. We have reiterated our decision as to the suitability of the new test for determining targeted dumping in several recent cases. See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008), and accompanying Issues and Decision Memorandum ("Tires from the PRC") at Comments 23.C. and 23.H.

We also disagree with the petitioner's contention that the new targeted dumping test eliminates most sales from consideration before testing for a pattern or a significant difference in price. The petitioner argues that the Department's proposed methodology is invalid because before the Department begins any analysis of targeting (i.e., analyzing whether a pattern exists or whether there is a significant difference in price), the Department's use of a standard deviation cut-off point results in an automatic finding that only a small portion of outlier sales could ever be found to be targeted.

To implement the statutory provisions on targeted dumping, the Department needs a definition of "pattern" because the statute requires that we identify a pattern of export prices pursuant to section 777A(d)(1)(B)(i) of the Act. For this purpose, the Department defines "pattern" as prices that distinguish the alleged target from others and, further, that the prices are "low" on CONNUMs that account for at least 33 percent of sales to the alleged target. "Low," for a given CONNUM, is defined to be at least one standard deviation below the average market price, i.e., the weighted-average market price across all customers who purchased that CONNUM in the POI. See Tires from the PRC at Comment 23.B. We consider the price threshold of one standard deviation below the average market price as a reasonable indicator of a price difference that may be based on targeted dumping because (1) it is a measure of "low" relative to the spread or dispersion of prices in the market in question, and (2) it strikes a balance between two extremes, the first being where any price below the price is sufficient to distinguish the alleged target from others (as may be the case under the P/2 test), and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others. See Nails from the UAE at Comment 3 and Tires from the PRC at Comment 23.B.

Comment 4: Whether the Department Should Alter Its Level of Trade Analysis

The petitioner argues that the Department should find more than one LOT in the U.S. market and not make an LOT adjustment to NV for all comparisons to the U.S. price. See Section 773(a)(7)(A) of the Act. If the Department is unable to make a LOT adjustment based on price differences, then the petitioner argues that the Department should make a CEP offset in accordance with section 773(a)(7)(B) of the Act. However, where the Department finds that the LOT in the U.S. market is at a more advanced stage of marketing or at the same LOT, the petitioner argues that the Department should not make a CEP offset.

The petitioner contends that there are three LOTs in the United States which include sales made by MSSA Co. ("U.S. Channel 1"), sales made by MSSA Co. out of the Pasadena, Texas reload

facility ("U.S. Channel 2"), and sales made by CSI ("U.S. Channel 3"). The petitioner believes that U.S. Channel 2 is at a more advanced stage of marketing than the home market LOT, while U.S. Channel 1 is at the same LOT as in the home market. The petitioner still considers U.S. Channel 3 to be at a lower LOT than the home market LOT.

According to the petitioner, MSSA's selling activity and functions table is inaccurate for U.S. Channels 1 and 2. The petitioner submitted a revised table in its proprietary version of the case brief at Exhibits 4 and 5. For comparison to U.S. Channel 2, the petitioner argues that some selling functions in the home market did not necessarily require as much activity as reported. For example, the petitioner refers to the Sales Verification Report at 3, where MSSA states that the sales team "does not do much marketing or develop strategies in either France or other markets." The petitioner points to two additional selling functions where it suggests that the selling activities in the United States were greater than in the home market. Therefore, the petitioner contends that the Department should treat U.S. Channel 2 as a separate LOT and at a more advanced stage of marketing than the home market LOT and make an upward LOT adjustment to NV.

As for U.S. Channel 1, the petitioner claims that the explanation given in Exhibit 5 of the petitioner's case brief supports the conclusion that the sales are made at the same LOT as in the home market. The petitioner claims that certain activities were made in the home market LOT but not the U.S. Channel 1. The petitioner believes that MSSA essentially performed the same selling activities in both markets. Therefore, it contends that an LOT adjustment or CEP offset is not necessary for U.S. Channel 1 sales.

MSSA argues that the petitioner takes out of context the Sales Verification Report at page 3 when the petitioner states the sales team, "does not do much marketing or develop strategies in either France or other markets." In response, MSSA cites to page 10 of the Sales Verification Report which states that, "the two companies have regular conversations concerning sales related matters." The statement refers to MSSA and one of its French customers. MSSA also contends that it provides significant additional selling functions and activities besides "strategic marketing and development." MSSA states that it cleans equipment for one of its French customers, follows-up with French customers when it believes there are new applications for sodium metal, provides research and maintenance, and manages production and logistics for all sales in France. See Sales Verification Report at 10.

MSSA claims that the petitioner misses the point that CSI is extensively involved in the selling activities for its U.S. customer and MSSA Co. is extensively involved in the sales administrative functions. MSSA cites page 4 of its April 29, 2008, response to the fourth sales supplemental questionnaire. In the response, MSSA explained that its commission agreement between MSSA Co. and CSI identifies duties of CSI as MSSA Co.'s representative. In contrast, MSSA argues that MSSA S.A.S. does not have a commission agent in the French market. It maintains that MSSA S.A.S. handles all of the sales activities and functions for French market sales. Furthermore, it contends that it has many smaller customers in France for which it must expend more sales administrative resources for its French sales than its U.S. sales. For example, MSSA explains that it does not have a price list for these smaller customers and must negotiate with each customer.

MSSA argues that all expenses associated with CSI's selling activities and functions are deducted for LOT purposes. Therefore, after deducting the expenses associated with selling activities and functions in the United States, MSSA provides considerably fewer selling functions for U.S. sales than it does for French market sales. MSSA explains that after removing the selling activities that occur in the United States, the LOT is MSSA S.A.S. to MSSA Co. and CSI. MSSA refers to Preliminary Results of Antidumping Duty Administrative Review: Gray Portland Cement and Clinker From Mexico, 70 FR 54013 (September 13, 2005), in support of its argument.

Next, MSSA argues that although it does not have a signed long-term agreement in France, MSSA did negotiate pricing agreements with one French customer during the POI. MSSA refers to the draft agreements with MSSA's largest home market customer which were submitted in Exhibits A-Supp.-6(A) and A-Supp.-6(B) of the March 6, 2008, supplemental section A questionnaire response. Furthermore, MSSA contends that MSSA is not as involved in the negotiations with U.S. customers because CSI is heavily involved in the negotiations with U.S. customers. MSSA refers to pages 2-5 of its April 29, 2008, fourth sales supplemental questionnaire response.

Finally, MSSA addressed the following selling functions based on its response to the Department's questionnaire and the Sales Verification Report. MSSA lists sales forecasting, strategic planning, sales promotion, engineering services, inventory maintenance, order input/processing, direct sales personnel, sales support, market research, technical assistance, freight & delivery, negotiation of long-term contracts, sales administration, and pricing terms at pages 16-19 of its rebuttal brief. For each of these selling functions, MSSA maintains that after deducting MSSA Co.'s or CSI's selling activities, MSSA does more for French market sales than for U.S. sales.

In response to the selling functions which the petitioner claimed to be different, MSSA explains that it provides research and maintenance for its French customer, while CSI normally recommends a U.S. company to its customers for technical assistance. For strategic planning, MSSA explains that it provides on-going strategic planning for its largest French customer and follows up with its other customers in the French market when it believes there are new applications for sodium metal. For the U.S. market, MSSA maintains that CSI plays a significant role in strategic planning. With regard to the negotiation of long-term contracts, MSSA argues that although it did not present a signed contract with its largest customer in France, there are significant negotiations which take place. As for the U.S. market, CSI is also involved in the negotiations. Therefore, MSSA believes the Department appropriately found only one LOT in the home market which is more advanced than the one LOT in the U.S. market.

The Department's Position:

We disagree with the petitioner's contention that there are three LOTs in the U.S. market. As noted in the Department's Calculation Memorandum for MSSA S.A.S., and its affiliates MSSA Co. and CSI, from Dennis McClure and Joy Zhang to James Terpstra, dated May 21, 2008 ("Preliminary Calculation Memorandum"), we examined the stages in the marketing process and selling functions along the chains of distribution for sales to MSSA's customers in the home market and MSSA and its U.S. affiliates, MSSA Co. and CSI. Specifically, in our comparison of

the U.S. and home market LOTs, we eliminated from consideration selling functions performed by MSSA Co. and CSI and only considered the portion of the selling functions performed by MSSA S.A.S. after making adjustments under section 772(d) of the Act.

As explained in the Department's Preliminary Calculation Memorandum, we determined that the selling functions were the same for all three U.S. channels, with the exception of the activity performed by MSSA S.A.S.'s product manager for U.S. channel 3 sales. In the petitioner's case brief, where it claims a higher degree of selling activity in the United States, especially for channel 2 sales, it generally bases its analysis on an agreement with MSSA S.A.S.'s reload facility. However, based on the agreement and the selling activities which the petitioner claims to have a greater level of selling activity (i.e., strategic/economic planning, personnel training/exchange), it is apparent that the majority of the activity is related to economic activities occurring in the United States.

In the U.S. market, with respect to U.S. channels 1 and 2, it is clear that MSSA S.A.S.'s U.S. affiliates, MSSA Co. and CSI, perform the majority of the selling activities which are excluded from our analysis because the activities relate to economic activities occurring in the United States. For example, on page 10 of the Sales Verification Report, we note that CSI is responsible for providing instructions to MSSA S.A.S.'s reload facility. We also note in the Sales Verification Report that CSI works with the U.S. customer with respect to technical assistance. In addition, we note that a business consultant in the United States provides business management services for MSSA S.A.S. These activities occur in the United States and would not be included in our LOT analysis.

Furthermore, the petitioner fails to address the Department's review of the reported selling activities, customer categories, sales terms and distribution channels in the United States and comparison market at page 10 of the Sales Verification Report, with the exception of the trips to visit the U.S. customer made by MSSA S.A.S.'s sales director once or twice a year. However, the Department would consider these trips related to economic activity in the United States and exclude this activity from its LOT analysis. Moreover, at verification, MSSA S.A.S. explained that it has regular conversations concerning sales-related matters and cleans the equipment of the French customer. We also reviewed documentation related to research and maintenance for its French customer during verification. Furthermore, MSSA S.A.S. officials explained that they manage the production and logistics for all sales in France. See Sales Verification Report at 10.

Therefore, after further review, the Department finds that there is one LOT in the U.S. market which is at a less advanced LOT than the home market. In accordance with section 772(d) of the Act, we focus on the selling activities of MSSA S.A.S. to its affiliates in the U.S. market to determine the LOT. We note that the selling functions (i.e., sales administration, pricing, payment terms, negotiations, technical assistance, and packing) related to sales process and marketing support are similar for all three U.S. channels of distribution, with the exception of order input processing, direct sales personnel, and strategic planning which differ somewhat among the channels of distribution. We also note that the selling function related to freight and delivery is similar for all three U.S. channels of distribution. Therefore, we find the same LOT for all U.S. sales.

Finally, as we note above, at page 10 of our Sales Verification Report, we identify a significant number of selling functions performed by MSSA S.A.S. in its home market. Therefore, the

home market LOT is at a significantly more advanced LOT, especially with regard to its selling functions related to the sales process and marketing support. In our analysis, we determine the NV LOT is more remote from the factory than the CEP LOT and there is no basis for determining whether the difference in the LOTs between NV and CEP affects price comparability. Therefore, we have made an adjustment to NV in accordance with section 773(a)(7)(B) of the Act (the CEP-offset provision).

Comment 5: Whether the Department Should Calculate Certain Home Market Packing Expenses Based on Facts Available

The petitioner argues that MSSA did not calculate its packing expenses for certain packing in the home market as accurately as possible and that it did not explain certain inaccuracies. See 19 CFR 351.401(g)(2). It contends that MSSA included packing costs for certain packing included in packing type 4, which was not shipped in the home market during the POI. Therefore, the petitioner argues that the Department should base the packing cost for packing type 4 on adverse facts otherwise available.

The petitioner contends that MSSA's largest customer is the only customer to which MSSA shipped bulk sodium metal in packing type 4. The petitioner cites to MSSA's response and the Department's Sales Verification Report at page 28 of its case brief. Therefore, the petitioner reasons that no form of packing other than that related to bulk shipments to its largest customer should be included in packing type 4.

The petitioner argues that the record of evidence shows that MSSA could have calculated home market packing expenses specifically related to bulk shipments to the largest customer. The petitioner points out that the Department discovered, at verification, that MSSA could separate the labor costs associated with both forms of packing included in packing type 4. Furthermore, the petitioner states that the Department discovered that MSSA could separate the variable costs associated with both forms of packing. Finally, the petitioner argues that MSSA failed to substantiate its claim that "the additional labor cost offsets the material cost" between the two forms of packing.

The petitioner argues that MSSA failed to explain why the allocation methodology used to calculate the home market packing expenses for bulk shipments does not cause inaccuracies or distortions. The petitioner contends that the verification report indicates that MSSA's calculation of packing expenses could have been specifically related to the packing form used for its largest home market customer. However, while MSSA stated that the additional labor costs offset the material costs related to the other form of packing, the petitioner notes that MSSA did not provide the Department with material costs for both packing forms. The petitioner also argues that the fact that both forms of packing are packed in the same area and considered part of the same family does not mean that two different forms of packing do not cause inaccuracies or distortions.

Therefore, the petitioner argues that the Department should calculate MSSA's home market packing expense for bulk shipments based on facts otherwise available. The petitioner asserts that necessary information is not on the record and the MSSA failed to provide the Department with requested information in the form and manner requested. See Sections 776(a)(1) and 776(a)(2)(B) of the Act. In addition, the petitioner explains that the Department's questionnaire

asks the respondent to calculate packing expense on as specific a basis as is feasible. See Questionnaire at G-5.

The petitioner claims that the Department should base the packing expense on an inference that is adverse to the interest of the respondent. See Section 776(b) of the Act. The petitioner suggests using the average per unit packing expense for bulk sodium shipments submitted on July 16, 2008, by MSSA as part of MSSA's corrections of errors resulting from verification. The petitioner argues that this amount represents an appropriate selection for facts otherwise available because it ties directly to the costs incurred by MSSA to pack bulk sodium metal, yet is adverse to MSSA's interest.

MSSA argues that the verification report explains why MSSA appropriately grouped both types of containers together to calculate packing expenses. MSSA explains that the Sales Verification Report notes that both types of containers are packed in the same area and considered part of the same family of products. MSSA cites Exhibit 13 and pages 25-26 of the Sales Verification Report.

Finally, MSSA points out that, although the material cost is different for the two types of containers, the labor cost is also different for the two types of containers. MSSA asserts that the difference between the material cost and labor cost effectively offset each other so that the overall variable costs are similar for both types of containers. MSSA cites page 26 of the Sales Verification Report where the Department noted that the variable costs for the two types of containers are similar. MSSA maintains that it provided significant information concerning the cost associated with the two similar containers. Therefore, MSSA asserts that it properly grouped the two types of packing containers together because of the similar costs and they are packed in the same area and considered part of the same family of products.

The Department's Position:

We disagree with the petitioner that MSSA's packing calculation distorts the reported cost, and that the Department should calculate MSSA's home market packing expense for bulk shipments based on facts otherwise available. Although the Department's regulations state that the respondent must explain why the allocation methodology used does not cause inaccuracies or distortions, that very provision of the regulations states that, "an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific basis as is feasible…." See 19 CFR 351.401(g)(2) (emphasis added). Therefore, the Department must examine the feasibility as well as determine whether the allocation is inaccurate or distorted.

In accordance with 19 CFR 351.401(g)(3), "the Secretary will take into account the records maintained by the party in question in the ordinary course of its business, as well as such factors as the normal accounting practices in the country and industry in question and the number of sales made by the party during the period of investigation or review." At verification, we closely examined the issue of why MSSA grouped the two types of packing containers (included in packing type 4) together and found that MSSA's grouping of the two types of packing was reasonable because it maintains its records in this form in the ordinary course of business. Furthermore, MSSA explained that it packs the sodium metal in certain areas of its plant and considers the packing in these areas part of the same family of products. See Sales Verification

Report at 25. In addition, as noted in our Sales Verification Report at 25, MSSA was not able to attribute one of its material inputs of packing to several families of related products, which was an indication of the difficulty associated with more specifically reporting its packing costs.

Moreover, as explained in MSSA's April 11, 2008, supplemental response, its labor hours are not recorded in the accounting system. See MSSA's April 11, 2008, supplemental response at 12. In addition, at verification, we reviewed the cost of labor and material associated with the two types of packing. Although the cost of labor is greater for one packing container, we note that that the material cost of the other packing container is greater than the material cost of the former packing container. We found the variable costs for the two types of packing containers are similar. See Sales Verification Report at 25 and MSSA S.A.S. Verification Exhibit 13.

Moreover, in this case, MSSA did not withhold or fail to provide information that was requested in a timely manner and in the form required, nor did MSSA significantly impede the proceeding, or provide a response which could not be verified. See 19 CFR 351.308(a). Further, as evidenced at verification, MSSA cooperated and acted to the best of its ability to comply with the Department's request for information. Therefore, we determine that it is not feasible based on MSSA's accounting system to calculate a more specific packing cost. Accordingly, the use of facts available is not warranted.

Comment 6: Whether the Department Should Re-allocate Indirect Selling Expenses Based on Sales Value

The petitioner argues that MSSA used the incorrect allocation methodology to calculate its indirect selling expenses incurred to sell the product in the foreign market ("INDIRSH") and indirect selling expenses incurred in the country of manufacture to sell the product to the United States ("DINDIRSU"). The petitioner contends that MSSA over-allocated the indirect selling expenses related to home market sales and under-allocated the indirect selling expenses related to the U.S. market based on the Department's findings at verification. See Sales Verification Report at 2. The petitioner requests the Department to correct MSSA S.A.S.'s allocation of indirect selling expenses based on sales value and demonstrate how it would recalculate indirect selling expenses on pages 32 to 34 of its case brief.

MSSA agrees with the petitioner that the Department should correct MSSA's indirect selling expense in the home market and the domestic indirect selling expense for U.S. sales based on the relative sales value. However, MSSA notes that the petitioner included expenses related to sales of other products in its recalculation of indirect selling expenses. MSSA argues that their allocation is sodium specific and that it would be improper to allocate any non-sodium sales personnel expenses to sodium sales.

The Department's Position:

We agree with both parties and have recalculated INDIRSH and DINDIRSU. When transaction-specific reporting is not feasible, the Department's practice is to consider allocated expenses, provided we are satisfied that the allocation methodology used does not cause inaccuracies or distortions. See 19 CFR 351.401(g)(1). Indirect selling expenses, by definition, cannot be identified with specific transactions and thus, must be allocated to reported sales. Typically, the Department allocates indirect selling expenses by multiplying the price of each sale by the ratio

of total indirect selling expenses to total sales revenue (the indirect selling expense ratio). See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from the Republic of Korea, 64 FR 15444, 15455 (March 31, 1999). In order to ensure that MSSA has not over-allocated or under-allocated its reported indirect selling expenses and that the reported expenses are accurate, we have revised the indirect selling expense ratios, based on our findings at verification. See Sales Verification Report at 2. We calculate the indirect selling expense ratio by dividing the sales value in each market by the total sales value. Furthermore, we have excluded the non-sodium sales personnel expenses. See Memorandum to James Terpstra, Program Manager for the Office of AD/CVD Operations, from Dennis McClure and Joy Zhang, Analysts for the Office of AD/CVD Operations, RE: Antidumping Duty Investigation of Sodium Metal from France, Subject: Final Analysis Memorandum for Sales – MSSA, dated October 10, 2008 ("Final Analysis Memorandum").

Comment 7: Whether the Department Should Deduct Freight from Transfer Price Before Calculating Domestic Indirect Selling Expenses

The petitioner argues that MSSA distorts domestic indirect selling expense for the U.S. market when it deducts freight from the transfer price in its calculation. The petitioner cites to an example of the distortion caused by the deduction of freight from page 2 of the Sales Verification Report.

MSSA argues that the transfer price is seldom booked net of freight expenses. In fact, MSSA states that the record of evidence demonstrates that nearly every MSSA S.A.S. transfer invoice to MSSA Co. or CSI includes freight expense, and is not booked "net" of freight expense. MSSA uses exhibits 17 and 18 of the Sales Verification Report to support its claim. For one unusual sale, MSSA S.A.S. claims that it separately billed CSI for freight which does not mean that MSSA S.A.S. normally books the transfer price net of freight. See Sales Verification Report at Exhibit 19. MSSA suggests, at most, that the Department should correct DINDIRSU for the one unusual CSI sale.

The Department's Position:

We agree with the petitioner. Given the fact that we base MSSA's indirect selling ratio on sales value (See *supra* Comment 6), and that MSSA S.A.S' sales revenue is not booked net of freight as pointed out by MSSA and verified by the Department, we calculate DINDIRSU by applying the indirect selling expense ratio to the transfer price without deducting freight for the final determination.

Comment 8: Whether the Department Should Correct MSSA Co.'s Inventory Carrying Costs in the United States

The petitioner requests the Department to recalculate inventory carrying costs because MSSA used the sales amount as opposed to the amount for cost of goods sold to calculate MSSA Co.'s inventory carrying period. The petitioner refers to pages 3 and 24 of the Department's Sales Verification Report, which notes that the inventory carrying period was based on sales instead of cost of goods sold.

MSSA did not comment in its rebuttal brief concerning this issue.

The Department's Position:

We agree with the petitioner. The Department's questionnaire requests respondents to report the per unit opportunity cost incurred from the time of arrival in the United States until the time of shipment from the warehouse or other intermediate location in the United States to the first unaffiliated customer. At verification, we noted that MSSA Co. used the sales amount to calculate the inventory turnover ratio, which was used to calculate the inventory carrying period. See Sales Verification Report at 3 and 24. However, the inventory turnover ratio is calculated by dividing the cost of goods on hand (inventory) to the cost of goods sold for an entire year. See The McGraw-Hill 36-Hour Accounting Course, Third Ed., by Robert L. Dixon and Harold E. Arnett at 133. Therefore, we have recalculated MSSA Co.'s inventory carrying cost based on inventory turnover calculated using cost of goods sold. The Department's Final Analysis Memorandum shows how the Department recalculated MSSA Co.'s inventory carrying cost.

Comment 9: Whether the Department Incorrectly Characterized MSSA Co.'s Quantity and Value Reconciliation

MSSA states that the Department in its Sales Verification Report incorrectly mischaracterizes the slight difference in MSSA Co's sales quantity and value reconciliation. MSSA argues that the slight difference is not between MSSA Co.'s submitted Section C sales database and the accounting records reviewed by the Department during the sales verification, but rather between the Department's re-calculation of the Euro-denominated amounts in U.S. dollars and the actual, historical converted and booked U.S. dollar amounts in MSSA Co.'s accounting records for Euro-denominated sales.

The petitioner did not comment on this issue.

The Department's Position:

We agree with MSSA that MSSA Co. demonstrated at MSSA Co.'s sales verification that its sales quantity and value reconcile to its reported Section C sales database, and that the slight difference is due to the difference between a total U.S. dollar value calculated by the Department using the Department's daily U.S. Federal Reserve Exchange Rate and the U.S. dollar value calculated by MSSA Co. in its normal course of business, using its monthly exchange rate methodology.

Comment 10: Whether the Department Correctly Calculated Indirect Selling Expenses Incurred in the Home Market for Purposes of the CEP Deduction

MSSA alleges that in the preliminary determination, the Department incorrectly calculated the ratio used to calculate MSSA's CEP deduction (DINDIRSU2) based on indirect selling expenses incurred in the country of manufacture to sell the product to the United States. MSSA argues that MSSA S.A.S.'s line-item list of sales administration expenses, which was provided at verification, shows that most of the expenses in question were either too general to be considered specifically associated with U.S. economic activities, or are associated with MSSA S.A.S.'s sales to affiliated U.S. parties rather than re-sales to unaffiliated U.S. customers. MSSA argues that the Department should only consider the salaries of the sales director, the sodium sales manager, and the sales administrator at MSSA S.A.S.

MSSA suggests that the Department deduct the indirect selling expenses that are too general in nature to be associated with economic activity in the United States or associated with the sale from MSSA to its U.S. affiliates and not associated specifically with the sale to the unaffiliated U.S. customer. In support of its argument that the Department's practice is to deduct from CEP only those expenses associated with economic activities in the United States that relate to sales to unaffiliated purchasers, and that most of the expenses incurred in France (DINDIRSU) are not related to economic activities in the United States, MSSA cites Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 16, and Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 FR 13086 (March 20, 2007), and accompanying Issues and Decision Memorandum at Comment 4. Furthermore, MSSA argues that the Department's methodology that the Court endorsed in Mitsubshi Heavy Industries was not based on all home market indirect selling expenses. See Mitsubishi Heavy Indus. Co., Ltd. v. United States, 54 F. Supp. 2d 1187 (CIT 1999) ("Mitsubishi Heavy Industries").

MSSA also argues that the Department's citation to Carbon Steel Flat Products from Canada in the preliminary determination is inaccurate, because there was little or no detail on the record to distinguish certain selling expenses from those related to the downstream sale to unaffiliated U.S. customers and those general in nature or related only to the sale to the U.S. affiliate. See Final Results of the Antidumping Duty Administrative Review: Certain Corrosion-Resistant Carbon Steel Flat Products from Canada, 68 FR 2566 (January 16, 2004), and accompanying Issues and Decision Memorandum at Comment 3 ("Carbon Steel Flat Products from Canada").

As an alternative, MSSA proposes that the Department calculate an alternative ratio for the CEP deduction. First, MSSA suggests subtracting the other sales administration personnel and expenses, because the expenses are general in nature. Second, MSSA suggests allocating the expenses for sales director, sodium sales manager, and sales administrator to each market category based on relative sales value. Third, MSSA suggests summing the allocated expenses for director, sodium sales manager, and sales administrator. Fourth, MSSA explains that it agrees with the Department's use of the preliminary determination methodology for allocating DINDIRSU2. Finally, MSSA suggests that the Department divide the selling expenses allocated to DINDIRSU2 by total sodium sales to calculate the resulting ratio.

The petitioner opposes MSSA's request that the Department categorize certain indirect selling expenses incurred in France as not being associated with U.S. economic activities. The petitioner argues that MSSA's questionnaire responses never established that the indirect selling expenses incurred in France only relate to MSSA S.A.S's interactions with its U.S. affiliates, and not its re-sales to unaffiliated U.S. customers. The petitioner objects to the use of the detailed line-item list of selling expenses collected at verification as support for MSSA's claim that some expenses are too general in nature. The petitioner argues that an account's name alone cannot stand as proof that the activities associated with the expenses captured in the account are unrelated to U.S. economic activity. Moreover, the petitioner argues that the Department is not required to perform a line-by-line analysis of each and every expense as advocated by MSSA by citing Mitsubish Heavy Industries, Ltd., v. United States, 15 F. Supp. 2d 807, 818 (CIT 1998)

("once Commerce has decided to rely on CEP, the statute does not require that Commerce examine every potential CEP deduction to determine whether the activity generating the expense would be inconsistent with an EP transaction").

The petitioner asserts that MSSA failed to describe in detail the selling activities that comprise the pool of indirect selling expenses used to calculate DINDIRSU in its questionnaire responses, and that MSSA cannot then fault the Department if it deducts an allocated portion of that DINDIRSU from CEP. The petitioner also argues that its own LOT analysis in its case brief demonstrates that MSSA S.A.S. personnel performed a wide range of tasks in support of the company's sales to unaffiliated customers in the United States. Next, the petitioner asserts that the selling activity in the home market on behalf of U.S. shipments indicates that selling expenses incurred in France are associated with economic activities occurring in the United States. Therefore, the petitioner argues that the Department should reject MSSA's request and use the petitioner's revised calculation which increases DINDIRSU2 based on the analysis of selling activities presented in Comment 4 above.

The Department's Position:

We agree with the petitioner that pursuant to section 772(d) of the Act, the Department will make an adjustment for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser no matter where or when paid. Moreover, we disagree with MSSA's contention that Carbon Steel Flat Products from Canada does not apply to this investigation. MSSA's responses and the Department's Sales Verification Report and Exhibits provide sufficient detail to distinguish certain selling expenses from those related to the downstream sale to unaffiliated U.S. customers and those general in nature or related only to the sale to the U.S. affiliate.

However, we disagree with the petitioner that MSSA's request to exclude certain expenses from the pool of DINDIRSU to be deducted from CEP was untimely and unsupported by the record evidence. MSSA reported the total indirect selling expenses, as well as the salaries of its sales director, the sodium sales manager, and the sales administrator in its April 11, 2008, Section B supplemental questionnaire response. At verification, we reviewed and obtained detailed information comprising MSSA S.A.S's total indirect selling expenses. We conclude that the pool of indirect selling expenses in France included various general expenses that were not the type of expenses that ordinarily would be associated with United States economic activity.

Therefore, based on the information reported by MSSA and obtained at verification, we have conducted further analysis and revised the ratio calculation for the proper portion of DINDIRSU attributable to the sales to the unaffiliated customers in the Unites States. See Final Analysis Memorandum. For the final determination, we will apply the revised ratio to the salaries of the sales director, the sodium sales manager, and the sales administrator, which we conclude to be associated with the economic activities occurring in the United States. This is in accordance with Mitsubishi Heavy Industries, where the Court held that "Commerce reasonably interpreted the statute as requiring it to deduct from CEP indirect selling expenses that were associated with economic activities occurring in the United States."

Comment 11: Whether the Department Should Consider Certain Expenses Reported as Indirect Selling Expenses as Direct Deductions from the U.S. Price

MSSA and the petitioner agree with the Department's Sales Verification Report that certain movement expenses should be removed from the indirect selling expense calculation and deducted directly from U.S. price. See Sales Verification Report at 3.

The Department's Position:

We agree with both parties and have removed the movement expenses directly related to the sale of sodium metal from MSSA Co.'s indirect selling expense calculation. As explained on page 24 of the Sales Verification Report, we noted that certain accounts included in MSSA Co.'s indirect selling expense calculation were directly related to sodium sales. Therefore, we have separated these expenses directly related to sodium metal sales and deducted them directly from U.S. price in accordance with 19 CFR 351.401(c). The Department's Final Analysis Memorandum explains in further detail this correction to indirect selling expense and the U.S. price.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final determination of this investigation and the final weighted-average dumping margin for the investigated firm in the Federal Register.

Agree _____ Disagree _____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
(Date)