

MEMORANDUM TO: Edward C. Yang  
Acting Deputy Assistant Secretary  
for Import Administration

FROM: Susan H. Kuhbach  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty  
Administrative Review of Certain Welded Carbon Steel Standard  
Pipes and Tubes from India for the Period of Review May 1, 2008,  
through April 30, 2009

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## SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on certain carbon steel standard pipes and tubes from India covering the period May 1, 2008, through April 30, 2009. As a result of our analysis, we have made changes in the margin calculations. We recommend that you approve the positions described in this memorandum. Below is a complete list of the issues in this review for which we received comments from an interested party:

1. Date of Sale
2. Universe of Sales
3. Adjustment to Sales Price
4. Warranty Expense
5. Trading-Company Discount
6. Bank Charges
7. Credit-Expense Period

## BACKGROUND

On June 14, 2010, the Department of Commerce (the Department) published *Certain Welded Carbon Steel Standard Pipes and Tubes from India: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 33578 (June 14, 2010) (*Preliminary Results*), in the *Federal Register*.

We invited interested parties to comment on the *Preliminary Results*. We received timely filed case briefs from Lloyds Metals & Engineers Limited, Lloyds Steel Industries Limited, and

Lloyds Line Pipe (collectively, Lloyds), a respondent covered by the review, and Shamrock Building Materials, Inc. (Shamrock), an importer of subject merchandise. We received a timely filed rebuttal brief from a domestic interested party, Allied Tube and Conduit Corporation (Allied). No party requested a hearing.

We extended the due date for completion of these final results from October 12, 2010, to November 5, 2010. See *Certain Welded Carbon Steel Standard Pipes and Tubes from India: Extension of the Final Results of Antidumping Duty Administrative Review*, 75 FR 63439 (October 15, 2010).

## **Abbreviations**

The Act - The Tariff Act of 1930, as amended

Agreement – Agreement on Implementation on Article VI of the General Agreement on Tariffs and Trade 1994

CAFC - Court of Appeals for the Federal Circuit

CEP – constructed export price

EP – export price

I&D Memo - Issues and Decision Memorandum adopted by a *Federal Register* notice of the final determination of an investigation or final results of review

INR – Indian Rupee

Final Analysis Memo – Memorandum to the File entitled “Administrative Review of Certain Welded Carbon Steel Standard Pipes and Tubes From India: Final Analysis Memorandum for Lloyds Metals & Engineers Limited (5/1/08 - 4/30/09),” dated November 5, 2010

POR - period of review

Preamble –*Antidumping Duties; Countervailing Duties*, 62 FR 27296 (May 19, 1997)

Preliminary Analysis Memo - Memorandum to File entitled “Administrative Review of Certain Welded Carbon Steel Standard Pipes and Tubes From India: Preliminary Analysis Memorandum for Lloyds Metals & Engineers Limited (5/1/08 - 4/30/09),” dated June 7, 2010

SAA – Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994)

Verification Report - Memorandum to the File entitled “Verification of the Sales Response of Lloyds Metals and Engineers Limited in the May 1, 2008, through April 30, 2009, Administrative Review of Certain Welded Carbon Steel Standard Pipes and Tubes from India,” dated June 7, 2010

Verification Exhibits – “Certain Welded Carbon Steel Standard Pipes and Tubes from India: Sales Verification Exhibits of Lloyds Metals & Engineers Limited and Lloyds Steel Industries Limited,” dated May 11, 2010

USD – U.S. Dollar

WTO – World Trade Organization

## DISCUSSION OF ISSUES

### Date of Sale

Comment 1: Lloyds argues that the commercial-invoice date is the appropriate date of sale because it is only on that date that the exact quantity of a given sale is known. Lloyds asserts that using the commercial invoice as the date of sale would be in accordance with the Department's practice. Lloyds contends that only upon issuance of the commercial invoice (which can consist of several factory invoices) is the exact quantity of a shipment known. Lloyds states that the factory invoice is a shipping document and does not represent a sale.

Allied asserts that, for Lloyds's sales of subject merchandise to the United States, the Department's determination of the date of sale based on the date of the factory invoice was proper because the factory invoice is the first document that identifies the material terms of sale, *i.e.*, the price and quantity of subject merchandise shipped to the United States. Allied cites to the Preamble, stating that in it the Department indicated that its practice is to select as date of sale "the date on which the terms of a sale are first agreed" upon and Allied agrees with the Department's choice of the factory invoice because it is the first document in the sales trail that identifies the material terms of sale and is otherwise reasonable. Allied also argues that each commercial invoice is an aggregation of factory invoices and that the commercial invoices are not suitable for establishing the date of sale because the commercial invoices are preceded by the factory invoices.

Allied contends that, contrary to Lloyds's suggestion that a shipping document is unacceptable for the purposes of establishing the date of sale, the document selected for establishing the date of sale does not have to be a sales agreement or contract but should rather be the document that first identifies the actual quantity and price of the sale. Citing 19 CFR 351.401(i), Allied states that the Department should identify the date of sale as a date that "reflects the date on which the exporter or producer establishes the material terms of sale" and that, similarly, the SAA at 810 defines the date of sale as the "date when the material terms of sale are established." Further, according to Allied, the Agreement at Article 2.4.1 n.8 provides that "normally the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale." Finally, Allied asserts that Lloyds has not presented any information suggesting that the factory invoice does not identify the accurate price and quantity of sales.

Department's Position: The commercial-invoice date is not the appropriate date of sale to use in this instance. Rather, the factory-invoice date is the appropriate date of sale; it is also the date of shipment from the factory.

Section 351.401(i) of the Department's regulations states:

{i}n identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better

reflects the date on which the exporter or producer establishes the material terms of sale.

Our practice in determining the date of sale is to examine whether the invoice date or another date better represents the date on which the material terms of sale are established. See *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 18749, 18750 (April 7, 2008), unchanged in *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 73 FR 61019 (October 15, 2008).

Additionally, the Department has a long-standing practice of finding that, where shipment date precedes invoice date, the shipment date better reflects the date on which the material terms of sale are established. See *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand*, 69 FR 76918 (December 23, 2004) (*Shrimp from Thailand*), and the accompanying I&D Memo at Comment 10.<sup>1</sup> In our questionnaire we instruct respondents to report “the date of shipment from the factory or distribution warehouse to the customer” as the date of shipment. See the August 3, 2009, questionnaire at C-13.

In the *Preliminary Results* we followed our normal practice to determine the date of sale:

With respect to {Lloyds Metals & Engineers Limited}'s sales to the United States, Indian law requires that all merchandise be accompanied by an invoice when it leaves the factory. A commercial invoice follows the factory invoice at a later date. We have preliminarily determined that the material terms of sale are set on the date of shipment from the factory because shipment occurs at the same time as or before the invoice date (factory invoice or commercial invoice, as applicable).

See *Preliminary Results*, 75 FR at 33581.

The factory invoice indicates when the material terms of sale are established because it is the first document that indicates the establishment of an unaltered agreement for sale to the relevant EP customer. There is no indication on the record that any goods that left the factory were redirected or recalled. When the factory invoice is issued it represents the fact that a certain quantity of goods at a certain price is being sold either to a U.S. customer or to an Indian reseller.

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<sup>1</sup> In the *Preliminary Results* we relied on our practice as well:

The Department has a long-standing practice of finding that, where shipment date precedes invoice date, shipment date better reflects the date on which the material terms of sale are established. See *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand*, 69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10; see also *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Germany*, 67 FR 35497 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 2.

See *Preliminary Results*, 75 FR at 33581.

Contrary to Lloyds's argument, the commercial invoice is not an appropriate indicator of the date of sale for Lloyds's sales to the United States because the commercial invoice is issued after the date of shipment from the factory and, therefore, absent unique circumstances cannot be considered as the date of sale. It is not appropriate to use an invoice date that occurs after the date of shipment from the factory to establish the date of sale because, where the shipment date precedes the invoice date, the shipment date better reflects when the material terms of sale are established. See *Shrimp from Thailand* and the accompanying I&D Memo at Comment 10. For Lloyds's sales of subject merchandise to the United States we find that the material terms of sale are established when the goods leave the factory bound either for the U.S. customer or to an unaffiliated Indian reseller.

Additionally, Lloyds issues the factory invoice for each shipment from the factory to the appropriate EP customer, *i.e.*, to either the U.S. customer for direct sales to that customer or the trading company for sales through the trading company to the U.S. customer. The commercial invoice is always issued to the U.S. customer for both direct and indirect sales to the U.S. customer. See Lloyds's April 29, 2010, response at 2. Further, for the sales to trading companies the commercial invoice cannot establish the quantity sold to the trading company because title to the goods passed to the trading company when the goods left the factory, which occurred before the commercial invoice was issued to the final U.S. customer. See Lloyds's December 10, 2009, supplemental questionnaire response at 19. Because Lloyds does not issue the commercial invoice to the Indian trading company for these indirect sales to the U.S. customer, the commercial invoice cannot represent the establishment of the material terms of sale with the Indian trading company.

We find that the commercial invoice represents an aggregation of many sales and is not an effective determinant of the date of sale because the commercial invoice is issued after the date of shipment from the factory. Although Lloyds argues that the commercial invoice indicates when the exact quantity of a sale is known, we find that the quantity of a sale is determined on the factory-invoice date for each EP sale, either to Lloyds's U.S. customer for direct sales or to the Indian trading company. The commercial invoice only represents the quantity of goods exported. In some instances, the individual truckloads that make up the shipment for export have arrived at the port over a long duration of time. See Lloyds's May 14, 2010, U.S. sales database. A factory invoice is issued for each truckload when the goods leave the factory. See Lloyds's April 29, 2010, response at 2. When a commercial invoice is issued it indicates that an assortment of goods that were already shipped from the factory to the port of export is now being exported in one group to the U.S. customer. The quantity of goods to be sold to the EP customer (U.S. customer or Indian trading company) is determined as each shipment leaves the factory, not when a group of accumulated sales are shipped for export.

For the final results we have continued to use the factory-invoice date, which is also the date of shipment from the factory, as the date of sale.

## **Universe of Sales**

Comment 2: Lloyds argues that the Department's decision to limit the universe of sales to those sales which may have entered the United States during the POR was not in accordance with the

law. Lloyds argues that the Department stated its intent to use the factory-invoice date as the date of sale but then limited the universe of sales to those items entered during the POR and, in the absence of entry date, substituted the bill-of-lading date. According to Lloyds, the Department included sales in its analysis which occurred prior to the POR because the bill-of-lading date was during the POR. Lloyds argues that, in effect, this inclusion of such transactions makes the bill-of-lading date the date of sale instead of the Department's statement that, for purposes of date of sale, the bill-of-lading date cannot be considered because both the sales invoice and the date of shipment precede it.

Lloyds argues that the Department used sales made before the POR to calculate margins for the POR at issue when the Department's questionnaire stated that the respondent need to report sales made during the POR in a separate computer file. Lloyds states that these pre-POR sales were reported only because the date of sale was in question - whether it should be contract date, commercial-invoice date, or factory-invoice date. Lloyds states that the use of sales made before the POR to determine the universe of sales does not coincide with the Department's instructions in its questionnaire to report only sales made during the POR. Lloyds cites *Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 40492 (July 15, 2008) (*Shrimp from India*), and the accompanying I&D Memo at Comment 8 as an example of the Department's refusal to review sales from a previous period.

Lloyds argues further that the practice of not reviewing sales outside the POR was upheld by the CAFC in *Hynix Semiconductor, Inc. v. United States*, 424 F.3d 1363, 1368 (CAFC 2005) (*Hynix*), in which the court affirmed the Department's "standard practice" of using a sales-based methodology to determine the universe of sales.

Lloyds argues that the use of sales as opposed to entries in determining the universe of sales is important in cases such as the instant case where the Department does not know the entry date. Lloyds argues that the Department was not accurate when it stated in the *Preliminary Results* that it analyzed all sales entered during the POR because it did not know entry date and, therefore, could not analyze all sales entered during the POR. While the Department can surmise that a shipment at the beginning of the POR did in fact enter during the POR, Lloyds asserts that the Department has no way of knowing at what point at the end of the POR a shipment would enter the United States. Lloyds contends that, if the Department continues to use a surmised entry date, it is possible that sales reviewed in the 2008/2009 review will be reviewed again in the 2009/2010 review. Lloyds states that, in *Shrimp from India*, the Department opted to review sales during the POR to avoid this possibility. Lloyds argues that the Department should base the calculation on sales made during the POR. Lloyds adds that the use of POR sales as opposed to shipments would eliminate the need for the indexing of costs.

Shamrock supports Lloyds's comments about the possibility of twice-reviewed sales or missed sales as a result of the Department's use of bill-of-lading date to define the universe of sales.

Shamrock states that the Department has recognized elsewhere that, where the date of entry is not on the record, it is appropriate to use the date of sale to determine the universe of sales to review and that this practice was expressly affirmed by the CAFC in *Hynix*. Shamrock argues

that the Department should revise its calculations to include all sales with a date of sale, *i.e.*, factory-invoice date, within the POR.

Allied argues that the Department identified U.S. sales for review properly based on the bill-of-lading date. Allied cites *Helmerich & Payne, Inc. v. United States*, 24 F. Supp. 2d 304 (CIT 1998) (*Helmerich*), in support of its position that the Department has a long-standing practice of calculating and assessing duties on entries in reviews when the entry date is known and sales can be linked to entries. According to Allied, this practice is derived from the statutory mandate in section 751(a)(2)(C) of the Act to assess antidumping duties on entries of merchandise covered by a determination. In discussing this issue, Allied adds, the *Helmerich* court quoted *Silicon Metal From Argentina; Final Results of Antidumping Duty Administrative Review*, 58 FR 65336, 65344 (December 14, 1993), in which the Department stated that, if it did not require that companies report all sales which entered the United States during the POR, the Department would “never analyze these sales for assessment purposes...therefore, whenever the data permit, we conduct a review based on entries of the subject merchandise.” Allied also cites *Corus Staal BV v. United States*, 387 F. Supp. 2d 1291 (CIT 2005) (*Corus Staal*), which upholds “the Department’s preference to review sales based on entry dates unless there are compelling circumstances that warrant a different approach to determining the universe of sales to be examined during a particular review.”

Regarding Lloyds’s statement about the uncertainty of knowing whether sales actually entered during the POR, Allied asserts that the bill-of-lading date is a reasonable alternative to entry date and that Lloyds has not suggested a reasonable replacement proxy. Allied recognizes that any alternative to entry date used to identify the universe of sales upon which the final antidumping assessment is made may not capture entries during the POR perfectly. Allied supports the use of the bill-of-lading date and states that it is objective, definitive, and reasonably related to the entry date and should continue to be used in place of the unknown entry date. Further, Allied asserts, Lloyds’s claim that the Department’s use of the bill-of-lading date for determining assessment effectively makes the bill-of-lading date the date of sale (after the Department decided not to use the bill-of-lading date as a date of sale because it occurs after the date of sale and date of shipment) and inappropriately equates the Department’s date-of-sale analysis with its date-of-assessment analysis. According to Allied, the date-of-sale analysis ascertains which home-market sales are contemporaneous with the U.S. sales that are selected for determining the assessment rate. Allied asserts that the date-of-assessment analysis ascertains the universe of sales upon which the export price, normal value, and antidumping duties are calculated in determining the final antidumping duty assessment rate. Allied asserts that the date of sale and the date of assessment are two distinct analyses.

Allied asserts that Lloyds’s argument that pre-POR sales should not have been used in the analysis is incorrect as the date of sale of a U.S. sale under review may occur prior to the POR. In explanation Allied provides the example that sales could have an entry date during the POR but a contract date (date of sale) prior to the POR, to which contemporaneous home-market sales made prior to the POR would be compared.

Department’s Position: The Act states that “the administering authority shall determine (i) the normal value and export price (or constructed export price) of each entry of the subject

merchandise, and (ii) the dumping margin for each such entry.” See section 751(a)(2)(A) of the Act.

In the *Preliminary Results*, the Department based the universe of reviewed transactions for Lloyds on the bill-of-lading date. We selected this date because Lloyds was unable to provide entry data as all of Lloyds’s sales are one of two types of EP sales: 1) direct sales to the first unaffiliated customer in the United States in which the terms of sale were “Cost and Freight” or “Cost, Insurance and Freight;” 2) sales to unaffiliated Indian trading companies with terms of sale “Forwarding Agent’s Certificate of Receipt.” See Lloyds’s May 14, 2010, U.S. sales database, the *Preliminary Results*, 75 FR at 33581, and the Preliminary Analysis Memo at 6-7. None of these terms of sale provides that Lloyds handle the importation of the subject merchandise into U.S. customs territory. For this reason, Lloyds is unable to provide entry data.

Where entry data are available, we have based the universe of sales on entry date in order to determine the EP and the dumping margin for each entry. See *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review, Partial Revocation of Antidumping Duty Order and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 28659 (May 17, 2006), and the accompanying I&D Memo at Comment 2. Where entry data are not available we have determined the universe of sales in another manner. Section 351.213(e)(1)(i) of the regulations permits the Department to define the universe of transactions examined during an administrative review using “entries, exports or sales of the subject merchandise” during the review period.

In the past where entry dates were not known we have used shipment dates to establish the universe of sales. See, e.g., *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part*, 70 FR 67665 (November 8, 2005), and the accompanying I&D Memo at Comment 5 (for two respondents where neither was the importer of record for its U.S. sales and therefore neither was able to report entry-date information, “we have defined the universe of sales using the date of shipment”).

For the purpose of determining the universe of sales based on shipment date where entry data are not available, it is appropriate to consider the date of shipment for export, not the ex-factory shipment date used as “date of shipment” when addressing the question of date of sale discussed in Comment 1. In this case, the bill-of-lading date serves as a reasonable indicator of the date on which goods are loaded aboard ship for export to and, ultimately, entry into the United States when defining the universe of sales by entries or exports as allowed under 19 CFR 351.213(e)(1)(i).

In our August 3, 2009, questionnaire we stated that the respondent should report a computer file containing sales made during the POR but we also instructed Lloyds as follows:

Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR; and (2) for CEP sales made after importation, report each transaction that has a **date of sale** within the POR.



See the August 3, 2009, questionnaire at C-2 (emphasis in original).

This instruction reflects our intent to use entry date if known for EP sales to establish the universe of sales or shipment date when entry date is unknown. This instruction also demonstrates that the Department might use date of sale for CEP sales to determine the universe of sales.

The Preamble to the Department's regulations describes the rationale of the aforementioned questionnaire instruction with respect to the correct universe of sales to report:

{B}ased on the results of each review, the Department generally will assess duties on entries made during the review period and will use assessment rates to effect those assessments. However, on a case-by-case basis, the Department may consider whether the ability to link sales with entries should cause the Department to base a review on sales of merchandise entered during the period of review, rather than on sales that occurred during the period of review. These two approaches differ, because, in the case of CEP sales, the delay between importation and resale to an unaffiliated customer means that merchandise entered during the review period often is different from the merchandise sold during that period. Because of the inability to tie entries to sales, the Department normally must base its review on sales made during the period of review. Where a respondent can tie its entries to its sales, we potentially can trace each entry of subject merchandise made during a review period to the particular sale or sales of that same merchandise to unaffiliated customers, and we conduct the review on that basis.

See Preamble, 62 FR at 27314.

The Preamble goes on to describe certain limited exceptions to the general rule outlined above. Specifically, the Preamble states:

{T}he determination of whether to a [*sic*] review sales of merchandise entered during the period of review hinges on such case-specific factors as whether certain sales of subject merchandise may be missed because, for example, the preceding review covered sales made during that review period or sales may not have occurred in time to be captured by the review. Additionally, the Department must consider whether a respondent has been able to link sales and entries previously for prior review periods and whether it appears likely that the respondent will continue to be able to link sales and entries in future reviews.

*Id.*

The exceptions are not relevant to the current POR because there was no administrative review for the previous POR. In the next POR, "missed" sales can be avoided by relying on the same methodology employed in this review because a sale/entry has only one bill-of-lading date and will therefore be included in the calculations only once for this or a subsequent review.

The Preamble's "case-by-case" statement reflects the Department's discretion to select a different methodology when the circumstances warrant. The inability to tie entries to sales may, but will not necessarily, lead to a review based on the use of sales made during the POR. The Department articulated that it may consider various factors when determining the method to use to establish the universe of sales. *Id.* Although the Department's decision to review sales, rather than entries, in certain cases has been upheld by the CIT, it is also clear that the antidumping regulations provide the Department with the flexibility to include just shipments (or just sales). As demonstrated above, our decision to use the ex-port shipment date as reflected in the bill of lading to establish the universe of sales in this case is in accordance with our questionnaire instructions and our practice for EP sales with unknown entry dates.

Our practice is to use entry date to establish the universe of sales only when sales can be linked to entries. Lloyds did not report entry dates for its sales. Furthermore, no party has demonstrated how to link sales to entries in this case. We can revert to shipments where that link cannot be established due to the flexibility of 19 CFR 351.213(e)(1)(i) and the discretion it allows us.

Lloyds cites *Shrimp from India* to argue that the Department does not review sales from a previous POR. The circumstances in *Shrimp from India* were different from those presented in this case. In *Shrimp from India*, the issue was whether the Department should include, in the universe of sales, sales that entered the United States during the POR but which had been reviewed in the prior administrative review when the universe of sales had been established using a different basis. The Department decided to exclude those U.S. sales reviewed in the previous administrative review for the respondent to avoid reviewing those same previously analyzed sales. The exclusion of the relevant sales in *Shrimp from India* kept with our practice "to review each entry of subject merchandise only once (*i.e.*, only in one administrative review)." See *Shrimp from India* and the accompanying I&D Memo at Comment 8. In this case, there is no possibility that we will examine sales that we examined previously because the last review of Lloyds was for the period May 1, 1987, through April 30, 1988.

Additionally, Lloyds argues that the use of a surmised entry date creates the possibility that sales included in the 2008/2009 review will be examined again in the 2009/2010 review. In this proceeding, however, we have rescinded the 2009/2010 review with respect to Lloyds. See *Certain Welded Carbon Steel Standard Pipes and Tubes from India: Rescission of Antidumping Duty Administrative Review*, 75 FR 68327 (November 5, 2010). Therefore, there is no potential to duplicate or miss the examination of sales in the next review of the order we might conduct.

We find Lloyds's reliance on *Hynix* to be misplaced. While in that case the CAFC did uphold the Department's decision to apply a sales-based methodology to calculate antidumping duties, the CAFC's decision does not dictate that the Department must use a sales-based methodology in that or other cases. Furthermore, underlying the CAFC's decision were CEP sales. See *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review*, 66 FR 30688, 30692 (June 7, 2001), unchanged in *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 66 FR 52097 (October 12, 2001), and the accompanying I&D Memo at Comment 7. The court

does not comment on the Department's practices regarding the methodology for determining the universe of sale for EP sales, the type of sales made by Lloyds during the instant POR. For this same reason we are also not persuaded by Shamrock's argument that the *Hynix* court affirmed that, where the date of entry is not on the record, it is appropriate to use the date of sale to determine the universe of sales to be included in the review.

Lloyds argues that using the bill-of-lading date to establish the universe of sales effectively makes the bill-of-lading date the date of sale although we had previously decided not to use the bill-of-lading date as the date of sale. As discussed in our response to Comment 1, the analysis of date of sale in this case turns on invoice date and the ex-factory date of shipment. The bill-of-lading date cannot be a candidate for date of sale because it occurs after the material terms of sale are established, *i.e.*, it is after the invoice date.

In support of its preference to use the date of sale to establish the universe of sales, Lloyds states that the use of POR sales as opposed to shipments would eliminate the need for the indexing of costs. First, whether we need to index costs has no bearing on our decision regarding the basis for the universe of sales. Second, we would still index costs during the POR because we are using the alternative cost methodology. See Memorandum to Neal M. Halper, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Lloyds Metals and Engineers Limited and Lloyds Line Pipe Limited" dated June 7, 2010, at 3.

Allied's reliance on *Helmerich* in support of our practice of calculating and assessing duties on entries in reviews when the entry date is known and sales can be linked to entries is not instructive for the issue at hand because we are unable to link sales to entries and entry date is not known. Additionally, Allied cites *Helmerich* in support of our preference for conducting our analysis based on entries. We are unable to do so in this case because entry date is unknown. Finally, Allied cites *Corus Staal*, but here again the court's decision turns on linking entries to sales for EP sales; where entry date is unknown this link cannot be established.

Section 351.213(e)(1)(i) of the regulations allows us to use sales, exports, or entries to define the universe of sales. As stated above, we have used, for EP sales, entry date to establish the universe of sales where entry date is known. Where entry date is unknown and where there are lengthy lag times between shipment from the factory and shipment from the port, use of the date of shipment from the port is appropriate because this date is closer to the preferred methodology of using entry date for EP sales. We calculate a dumping margin that is applicable to each entry during the POR. In this case, information on the record indicates when the goods were shipped for export but not when they entered the customs territory of the United States. Here, we have used our discretion in choosing the bill-of-lading date because it is synonymous with export and it is the closest known date to entry date for transactions of subject merchandise. For Lloyds's sales, sometimes the date of sale (*i.e.*, factory-invoice date) occurs well before the bill-of-lading date (and by extension the unknown entry date). Therefore, a universe of sales based on the date of sale would have fewer sales in common with a universe of sales based on the entry date than the universe of sales that we have used in these final results, *i.e.*, the universe of sales based on the bill-of-lading date. This choice is in accordance with our practice for EP sales and the intention reflected in the questionnaire to use shipment (*i.e.*, export) date for EP sales where entry data is not known.

For the final results we have continued to use the bill-of-lading date to establish the universe of sales on which to calculate the antidumping duty margin for Lloyds.

### **Adjustment to Sale Price**

Comment 3: Lloyds and Shamrock argue that the Department characterized a price adjustment incorrectly as a warranty expense. Lloyds and Shamrock contend that there is no information on the record that supports the Department's determination that the credit note was related to a quality claim, and state that the credit note was issued to the final U.S. customer for the purposes of adjusting price. Shamrock contends that the replacement purchase order from the U.S. customer is dated before the merchandise was even shipped from the factory and that the new purchase order provides for inspection and approval by a third party.

Shamrock contends that the credit note and the price to the U.S. customer are relevant because, although Lloyds's customer for the EP sale is an Indian trading company, the price to the U.S. customer is relevant to the analysis because the trading company's markup is based on the final price to the customer.

Lloyds states that it did not treat the credit note as a warranty expense in its books and records and states that a letter from the final U.S. customer included in the verification exhibits describes the termination of the original purchase order in lieu of new terms. Lloyds states that there is no mention of a quality claim in this new agreement. Shamrock states that the letter outlining the new arrangements is captioned as a confirmation of a purchase-order revision and indicates that the parties have agreed to terminate their prior purchase order and revise both quantity and price. Lloyds also argues that the terms of this agreement indicate that, as of the time of its issuance, the goods had not been shipped or inspected by the final U.S. customer. Shamrock also states that the goods had not been shipped from the factory as of the date of the revision. In both Lloyds's and Shamrock's views, it is not possible for a quality claim to exist against merchandise that has not been shipped, received, or inspected. Further, Lloyds states, the new agreement predates the revised date of sale by nearly two weeks.

Shamrock also contends that the credit note states clearly that it is implemented with respect to a negotiated price reduction specific to the relevant sales contract. For this reason, Shamrock argues, the full amount of the credit note should only be applied to the specific sales transactions for which the credit note was issued. Citing *Oil Country Tubular Goods, Other Than Drill Pipe From Korea: Final Results of Antidumping Duty Administrative Review*, 67 FR 12520 (March 19, 2002) (*OCTG from Korea*), and the accompanying I&D Memo at Comment 5, Shamrock contends that it is common practice for the Department to distinguish between credit notes issued as compensation for warranty claims and credit notes issued for other purposes whereby only the former are treated as warranty expenses and the latter are treated as transaction-specific adjustments to price.

Shamrock argues that, had the credit note pertained to a warranty claim, the Department should still have applied the credit note only to the particular transactions to which it corresponds. It contends that allocation of this expense to totally unrelated transactions imported by Shamrock is

distortive because it has the effect of shifting to Shamrock some liability for antidumping duties on transactions in which it had no part. In support of this argument Shamrock cites *Notice of Final Determination of Sales at Less Than Fair Value Certain: Cold-Rolled Carbon Steel Flat Products From Brazil*, 67 FR 62134 (October 3, 2002) (*Cold-Rolled from Brazil*), and the accompanying I&D Memo at Comment 16, in which the Department adjusted for warranty expenses consisting of credit notes directly related to specific U.S. sales transactions on a transaction-specific basis and did not allocate the expenses over all U.S. sales.

Shamrock contends that the Department's inappropriate inclusion of the credit note in question in the warranty-expense numerator results in the overstatement of the dumping margin and antidumping duty assessment amount for Shamrock. Therefore, Shamrock contends, the Department should exclude the credit note from its calculation of the numerator in the warranty-expense allocation.

Lloyds contends that the revised sales contracts between Lloyds and the Indian trading company and between Lloyds and the final U.S. customer both indicate a lower price than the one used by the Department in the *Preliminary Results*. For the final results, Lloyds argues, the Department can either use the lower renegotiated USD price as the starting price or evenly allocate the credit note (in INR) over all sales covered by the renegotiated contract (all sales to this customer).

Allied asserts that it is not clear whether the Department characterized the adjustment on account of the credit note as a warranty expense or as a gross credit to U.S. sales to the customer and adjusted this amount together with the warranty expense.

Allied contends that, if the Department agrees with Lloyds's assertions that the credit note does not relate to a warranty claim and should not be included in the warranty-expense allocation, a separate adjustment should be made to reduce U.S. prices in general by the amount of the credit note.

Department's Position: We have examined information on the record and determined that we should not treat the credit note at issue as a warranty expense.

For its indirect sales, those through trading companies, Lloyds always negotiates the sale with the final U.S. customer. See Lloyds's September 21, 2009, questionnaire response at 14. The trading company is hired to provide financial services and act as reseller under the direction of Lloyds. *Id.* at 13. For the sales at issue, Lloyds and the final U.S. customer renegotiated price and quantity after the date of sale (and after the bill-of-lading date). See Verification Exhibits at 1359. The renegotiation resulted in a significant reduction in the unit prices and the quantity terms compared to those terms in the original sales contract with the final U.S. customer and, therefore, in the factory invoices made out to the trading company. The total quantity sold was adjusted downward to meet the below-tolerance quantity shipped. The price was substantially reduced; a single per-unit price for every control number replaced the original price terms. *Id.* Before the renegotiation there were two prices, each one for a distinct group of control numbers. See the September 21, 2009, U.S. sales database. Lloyds first booked its accounts-receivables entries for these sales based on the quantity shipped at the prices outlined in the original sales contract. The renegotiated terms of sale required a substantial decrease in the outstanding

balance due from the U.S. customer to the trading company and the trading company to Lloyds. After the renegotiation Lloyds booked a credit note to lower the value of the outstanding balance for these transactions. See Verification Exhibits at 1366. The renegotiation with the final U.S. customer led to a renegotiation between Lloyds and the trading company where price and quantity were altered with respect to the new terms to which Lloyds and the final U.S. customer agreed. In the *Preliminary Results* we included the value of this credit note in the numerator of the warranty-expense allocation.

The record indicates that the credit note adjusts Lloyds's accounts-receivable ledger with respect to the U.S. customer after a renegotiation of price and quantity involving all sales that stem from a particular sales contract with a U.S. customer. Lloyds made sales through a trading company which bought the goods from Lloyds and sold them to the U.S. customer at the direction of Lloyds. The U.S. customer terminated the original sales contract after the date of sale (and the bill-of-lading date); then it renegotiated the total volume to reflect the total quantity of goods shipped (this quantity was short of the sales contract in place before the goods were shipped for export) and a reduced price. In examining the record we find that there is no information that indicates that the credit note was issued in response to a quality claim. The credit note was issued several weeks after the renegotiation of the purchase order. There is no indication on the record of when the goods entered the United States or when they were inspected by the final U.S. customer or its agent. For these reasons, we have treated this credit note as a post-sale price adjustment to EP, not as a warranty expense.

Section 351.401(c) of the Department's regulations describes the "Use of price net of price adjustments" and states that:

{i}n calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary will use a price that is net of any price adjustment, as defined in § 351.102(b), that is reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable).

Section 351.102(b)(38) of the Department's regulations defines a "Price adjustment" as "{a}ny change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates, and post-sale price adjustments, that are reflected in the purchaser's net outlay." Pursuant to these regulations and consistent with *OCTG from Korea*, a post-sale price adjustment is treated as a billing adjustment. Pursuant to 19 CFR 351.401(c), the adjustment stemming from the credit note is "reasonably attributed" to the set of transactions that corresponds to the sales contract for which the credit note was issued, *i.e.*, the subject merchandise for which the credit note is specific. It is our practice to accept transaction-specific post-sale price adjustments concerning quantity and price. See *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 71 FR 40064 (July 14, 2006), and the accompanying I&D Memo at Comment 21. We do not agree with Allied that the credit note should be allocated reducing U.S. prices in general because we can tie the credit note directly to the group of sales it adjusts by sales contract number. See Lloyds's May 14, 2010, U.S. sales database.

In accordance with 19 CFR 351.401(c) and 351.102(b), it is appropriate to deduct the value of the post-sale price adjustment, *i.e.*, the credit note, such that the adjusted EPs reflect the use of the per-unit price stipulated by the renegotiation of the sales contract. Therefore, for the final results, we have used prices for these transactions that are net of the billing adjustment (post-sale price adjustment) attributed to the credit note at issue.

Contrary to Shamrock's view that the renegotiation of the sales contract occurred before the goods were shipped from the factory, the record indicates that the letter from the U.S. customer containing the replacement purchase order is dated after the factory invoice and, further, the letter is dated after the bill-of-lading date. See the May 14, 2010, U.S. sales database and the Verification Exhibits at 1359. While Shamrock is correct that the new purchase order calls for third-party inspection of the goods before the U.S. customer will receive them, there is no evidence on the record with respect to this clause of the purchase order.

We find that it is not appropriate to use the renegotiated USD price between Lloyds and the final U.S. customer because the EP transactions at issue are the INR-denominated transactions between Lloyds and the trading company as suggested by Lloyds and Shamrock. We also do not find it appropriate to use the INR-denominated prices to the trading company reported by Lloyds. Lloyds reported the prices corresponding to the original sales contract after subtracting a per-unit allocation of the credit in the last database it submitted before the *Preliminary Results*. See the May 14, 2010, U.S. sales database. These latter prices add up to the payment received by the Indian reseller for the subject merchandise from the U.S. customer but they do not reflect the fact that, according to the terms of the renegotiated sales contract with the U.S. customer, all subject merchandise was sold for one per-unit price.

Lloyds's alternative suggestion of allocating the credit note evenly across the transactions involved only reinforces the two-tiered price structure of the original sales contract and accompanying factory invoices. As a result, such an allocation would not reflect the renegotiated equivalent per-unit price.

Pursuant to section 772(a) of the Act, the EP is the "price at which the subject merchandise is first sold...before the date of importation by the producer...to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." For the transactions at issue, Lloyds sells the merchandise to an unaffiliated trading company in India for exportation to the United States. The terms of the sale to the trading company are governed by the sale to the U.S. customer which is controlled by Lloyds. See Lloyds's December 10, 2009, response at 18 and Verification Report at 7. Therefore, the change in price in the sale to the U.S. customer also changes the price of the sale to the Indian trading company, the EP sale in this instance. The trading company's agreement with Lloyds requires it to buy the goods and sell them at a certain price to a predetermined U.S. customer and return funds received from that customer to Lloyds, usually net of a discount for the trading company's services. Given the unique facts of this case, specifically the change in price structure between the old and new contracts, and Lloyds's direct price negotiation with the customer in the United States, we have recalculated the prices of merchandise at issue to reflect the single per-unit price with respect to the billing adjustment. In order to adjust for the credit note and retain the single per-unit price to which the parties agreed in the renegotiation we started with the prices adjusted for the credit

note as reported by Lloyds in its May 14, 2010, U.S. sales database. These prices still feature two different price points depending on the control number of the product. We multiplied each transaction's INR price by its quantity and summed the results. Next, we divided this total value of the transactions in INR by the sum of the quantities for these transactions and arrived at an average per-unit price.

Because we have not continued to count the credit note at issue as a warranty expense it is not necessary to address Shamrock's arguments concerning its application in a transactions-specific manner for which it cited *Cold-Rolled from Brazil*.

For the final results we have deducted the amount of the credit note at issue from the numerator of the calculation of warranty expenses and adjusted the EPs of the related transactions to a single per-unit price which reflects the terms of the overarching sales contract between Lloyds and the final U.S. customer.

### **Warranty Expense**

Comment 4: Lloyds disagrees with the Department's allocation of warranty expenses over the total quantity of goods entered, not total sales, and not specifically the sales related to the warranty expenses. Lloyds contends that the Department should have allocated warranty expenses over all sales in the most extensive database Lloyds provided because the relevant database includes all sales for which there are warranty claims. According to Lloyds, the sales database is extensive because, before the issuance of the *Preliminary Results*, the Department asked Lloyds to report all sales with either a contract date or a bill-of-lading date during the POR. Lloyds states that a number of quality claims are related to sales with both invoice dates and bill-of-lading dates before the beginning of the POR and that warranty expenses should be allocated to these sales. Lloyds argues that spreading the allocation over the entire sales experience represented in the larger database would be more consistent with the Department's practice of considering several years of data to determine warranty expense.

Citing *Honey from Argentina: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Intent Not to Revoke in Part*, 70 FR 76766 (December 28, 2005) (*Honey from Argentina Prelim*), Lloyds states that the Department has explained its practice as follows:

...if the warranty terms offered by the respondent at the time of sale are not significantly different from customer to customer, an allocation of warranty expenses over total sales or sales to the market in question is more reflective of the nature of the expense and the respondent's expectation that its pricing behavior will allow it to recoup these costs over time. Furthermore, because warranty expenses are not incurred until after a warranty claim has been received from a customer, can vary greatly from year to year, and can occur months or years after the relevant date of sale, the Department often bases warranty expenses on historical data rather than the expenses incurred during a single POR.

Lloyds argues that, in *Honey from Argentina Prelim*, the Department allocated warranty expenses during a three-year period over total sales for the three-year period. Lloyds argues that,



while the Department cannot use a three-year period in this case due to the fact that Lloyds has no warranty expenses in the three years before the POR (during part of this period there was no production), it could use sales from a longer time-span than the POR as a base of allocation by using the entire database Lloyds presented which includes all sales that pertain to the claimed warranty expenses.

Citing *NSK, Ltd. v. Koyo Seiko Co., Ltd.*, 190 F.3d 1321 (CAFC 1999) (*NSK*), Lloyds argues that the CAFC upheld the allocation of warranty expenses over total sales in each market and remarked that this approach was the Department's customary practice. Lloyds explains that the court also stated that the Department takes costs incurred during the period of investigation and applies them to all sales regardless of whether they were incurred on the merchandise actually sold during the period.

Shamrock argues that the Department stated that it had allocated warranty expense over POR sales but, instead, the Department allocated the expenses over entries. Shamrock contends that it is correct to allocate warranty expense over total sales during the POR rather than the total quantity entered.

Allied contends that the Department allocated the warranty expenses that were incurred during the POR properly over POR sales or entries without trying to match warranty expenses that were incurred during the POR with the sales to which the warranty expenses related. Allied states that the general nature of warranty expenses is such that warranty expenses of POR sales or entries cannot be ascertained at the time of response to the Department's questionnaire because of the lag in sales and the timeframes in which warranty expenses are incurred. In accordance with the recognition accorded such lag in *Honey from Argentina Prelim*, Allied recognizes that it is reasonable to allocate warranty expenses that occur during the POR over POR sales or entries. Allied also argues that Lloyds's cite to *NSK* supports the Department's practice in the present case to spread warranty expense over all sales in a market and include warranty expenses regardless of whether they were incurred on merchandise actually sold during the period. Allied contends that no changes to the Department's practice is necessary for the final results of review.

Department's Position: Our practice is to allocate warranty expenses over the total volume of sales in the market at issue where a company's warranty policy applies to all products and there are no significant differences between product lines and warranty terms for different customers. "Where a company has a warranty policy that it applies to all products and all sales our practice is to allocate warranty expenses over all sales. In circumstances where the warranty policy is limited to certain products, customers, or types of transactions, we may consider a narrower allocation." See *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Administrative Review and Partial Rescission*, 74 FR 11082 (March 16, 2009), and the accompanying I&D Memo at Comment 13 (*Carbon Steel from Korea*). Information on the record indicates that there are not significant differences between product lines and warranty terms for different customers in the market at issue. Also, information on the record does not indicate that Lloyds differentiates the warranty service it provides its U.S. customers for all subject merchandise.

If available, we consider historical data (usually three years of experience) and use it to

determine whether warranty expenses incurred during the POR at issue are consistent with the respondent's historical experience. This practice was explained in *Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review*, 74 FR 53468 (October 19, 2009), and the accompanying I&D Memo at Comment 5, where we stated that we examine a three-year period of historical warranty expenses in order to evaluate whether the POR warranty-expense period appears to be aberrational and that, “{w}here the annual warranty experience reflects a consistent historical pattern of experience and is not otherwise distortive, actual POR warranty information may be used” to determine warranty expense. See also *Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review*, 74 FR 50774 (October 1, 2009), and the accompanying I&D Memo at Comment 4. Lloyds does not have a historical period in which warranty expenses were incurred. As such, we are not able to distinguish between aberrant and normal warranty expenses and have instead used the expenses as reported.

Our normal practice is to allocate the total warranty expense incurred during the POR over the quantity of POR sales as determined by the date of sale. See *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010), and the accompanying I&D Memo at Comment 3. See also *NSK*, 190 F.3d at 1332. For these final results we have calculated a per-unit warranty expense allocation based on POR sales.

We disagree with Lloyds's argument that, because the database includes all sales for which there are warranty claims, we should distribute the POR warranty expense across the total quantity of sales reported in the database. The nature of warranty expense is unknown and unforeseeable at the time of sale. Therefore, at the time a respondent reports data for an antidumping proceeding for a specific period, the final figure for all warranty expenses stemming from POR sales cannot be known. See *Honey from Argentina: Final Results, Partial Rescission of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 71 FR 26333 (May 4, 2006), and the accompanying I&D Memo at Comment 1. For this reason, it is our practice to use warranty expenses incurred during the POR to adjust the price of POR sales regardless of when the sales occurred. If there is historical data of a sufficient time scale (three or more years) we can use historical data to gauge the reasonableness of reported POR expenses compared to historical experience; where we determine that current expenses are aberrant we may replace the current-POR allocation with the historical-average allocation. In this case, we do not have an appropriate period of historical information reflecting both sales and warranty expenses to which the reasonableness of the warranty expenses during the POR can be compared. Therefore, we must rely on information pertaining to the POR at issue to allocate warranty expenses.

Further, as we stated in *Carbon Steel from Korea*, it is not our practice to try to make transaction-specific or customer-specific matches for warranty expenses. See *Carbon Steel from Korea* and the accompanying I&D Memo at Comment 13. Therefore, Lloyds's reliance on *Honey from Argentina Prelim* to bring its non-POR sales into the warranty-expense allocation is inappropriate. *Honey from Argentina Prelim* states that “the Department often bases warranty expenses on historical data rather than the expenses incurred during a single POR” and cites the example of *Large Newspaper Printing Presses and Components Thereof*,

*Whether Assembled or Unassembled, From Germany: Final Results of Antidumping Duty Administrative Review*, 66 FR 11557 (February 26, 2001), and the accompanying I&D Memo at Comment 6, which states that, “[s]ince many warranties and guarantees extend over a period of time that is longer than the POR, the Department accepts an expense based on historical data.” The Department accepts current-POR expenses based on historical data due to the fact that many sales for which there are warranty expenses occur before the POR at issue and the warranty expenses incurred on current POR sales are unknowable at the time that data is reported. Also, the sales from outside the POR do not provide the “historical context” discussed in the cases cited by Lloyds. Adding expenses from outside the POR would dilute the warranty-expense allocation and in no way serve as a comparison to determine whether warranty expenses during the POR are reasonable.

Lloyds’s reliance on *NSK* to argue that the Department has on the record and should use data in the allocation of warranty expenses for all sales to which the warranty expenses could have pertained, including sales made outside the POR, is also misplaced. At issue in *NSK* was whether the Department was reasonable in basing a warranty allocation, in part, on data relating to out-of-scope merchandise, not whether the Department must include data from sales made outside the POR in calculating warranty-expense allocations. In *NSK* the court discusses the difficulties of tying warranty expenses to transactions and quotes a *Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change* by the Department of Commerce, 1985, at 39, which stated that the Department has used “warranty costs incurred during the period of investigation or historical warranty data incurred over a longer period as best available information for warranty costs associated with sales made during the period of investigation.” The quoted statement defines our practice to use either current data for the period of investigation or POR or revert to best available information and use past experience, *i.e.*, historical data as a proxy for unknown or unreliable current data. This statement of our practice is described correctly by Allied when it refers to *NSK*.

As explained in *Honey from Argentina Prelim*, it is appropriate to allocate POR warranty expenses over all sales in the market during the POR to recognize the lag between sales and the occurrence of warranty expenses. In the *Preliminary Results*, although we intended to allocate POR warranty expenses over POR sales, we used the total quantity of entries as the denominator in the warranty-expense calculation rather than the total quantity of sales.

In conclusion, we have recalculated the warranty-expense allocation using the quantity sold during the POR as the base upon which to determine the allocation.

### **Trading-Company Discount**

Comment 5: Lloyds and Shamrock argue that for sales made through the trading companies the Department should not have deducted the trading-company discount from a starting price that was already net of the discount. Lloyds explains that, in its response, it reported each of the following: 1) the price to the final U.S. customer in USD including the trading-company discount; 2) the trading-company discount in USD; 3) the sales price to the Indian trading company in INR net of the trading-company discount. Lloyds argues that it would have been appropriate to deduct the trading-company discount in the calculation of EP if the Department

had used the USD price to the final U.S. customer as the starting price.

Lloyds presents a reconciliation for one sales contract in which it calculated the total price of all goods sold in INR, converts this value to USD at the exchange rate from the sales contract (between Lloyds and the trading company), and then divides the remainder by the quantity to derive a value that is similar to the declared value of the trading-company discount. According to Lloyds, this reconciliation shows that the INR price reported for sales involving trading companies was net of the trading-company discount. Shamrock presents a duplicate reconciliation, making the same argument.

Department's Position: Section 772(a) of the Act describes EP as “the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States...” It is not appropriate in this case to use the trading-company discount to adjust EP because the amount Lloyds reported as the trading-company discount represents the difference in price between the value paid for the goods by the trading company and the value that the trading company invoices the final U.S. customer under Lloyds's direction. See Lloyds's April 6, 2010, response at 17. Lloyds reported both the price paid by the U.S. customer to the trading company and the price paid by the trading company to Lloyds. Where appropriate, we are using as EP the price paid to Lloyds by the trading company which Lloyds reported exclusive of the trading-company discount. Lloyds reported the trading-company discount because it reported information about its sale to the final U.S. customer.

The trading-company discount is included in the price to the final U.S. customer but not in the price Lloyds invoiced the trading company. Therefore, we find that we should not make an adjustment in our calculation of EP for the trading-company discount where we have used the price the trading company paid Lloyds.

## **Bank Charges**

Comment 6: Lloyds argues that the Department deducted bank charges incorrectly in the calculation of EP for sales made to the trading companies. Lloyds states that these expenses were incurred and paid by the trading companies and, therefore, are not selling expenses incurred by Lloyds. Lloyds contends that information on the record indicates that the bank charges reported under a direct selling expense variable for some trading company transactions are charged to the trading companies and not to Lloyds, as is clear in documents Lloyds provided at verification.

Department's Position: Section 772(a) of the Act describes EP as “the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of such merchandise outside the United States...to an unaffiliated purchaser for exportation to the United States....” Certain bank charges are not included in the amount Lloyds bills the trading companies because the banks bill the trading companies directly. These contested expenses are not attributable to the EP sale between Lloyds and the trading company. Therefore, it is not appropriate to adjust the price for these expenses.

In the final results we have not deducted certain bank charges in the calculation of EP for sales involving trading companies.

### **Credit Expense Period**

Comment 7: Lloyds argues that, for the purpose of calculating credit expense on sales to the United States, the Department should not have imputed a credit expense for the period between the factory-invoice date and the date of payment. Instead, Lloyds asserts, the Department should have used the bill-of-lading date rather than the factory-invoice date to determine the beginning of the period for which the credit expense applies. Lloyds cites the Department's Antidumping Manual in which the Department explains that the imputation of credit cost should correspond to a figure calculated reasonably to account for such value during the gap period between shipment and payment. Lloyds argues that, for direct sales, there is no obligation for the customer to pay for the goods until the bill-of-lading date.

Lloyds cites *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1385 (CAFC 2008) (2008) (*Mittal*), stating that the CAFC upheld the Department's use of a date after the date when the goods leave the plant for the purposes of calculating credit expense. Lloyds explains that the court stated that "{c}redit expenses are the costs associated with carrying accounts receivable on the books and the expenses related to extending credit to purchasers for the interim between shipping and payment." Lloyds states that no accounts receivable is entered on its books until the commercial invoice is issued concurrent with the bill-of-lading date and it is only when the commercial invoice is issued that there is an obligation to pay on the part of the customer. Lloyds also argues that its customer's obligation to pay is for all the goods for which the commercial invoice is issued and that there is no obligation to pay for individual truckloads corresponding to factory invoices.

Allied contends that the Department used the factory-invoice date properly as the starting point for the credit-expense period. Allied states that the factory-invoice date identifies the date that the merchandise is shipped from the factory whereas the bill-of-lading date occurs after numerous individual shipments are aggregated for shipment to the United States at the port of export.

Allied argues further that the Department should reduce the starting price by the costs of carrying inventory between production and shipment and then also reduce the price by the costs of carrying accounts receivable between shipment and payment. Therefore, Allied asserts, if the Department revises the starting point for the credit-expense calculation, it should also lengthen the inventory-carrying cost period up to the beginning of the credit-expense period.

Department's Position: For the final results we have continued to use the ex-factory shipment date as the beginning of the credit-expense period. For direct sales to the United States, Lloyds reported imputed credit expenses based on the time between the bill-of-lading date and date of payment. It is the Department's practice to use the date of shipment from the factory as the beginning of the imputed credit-expense period for EP sales. See *Notice of Final Determination of Sales at Less Than Fair Value: Narrow Woven Ribbons with Woven Selvedge from Taiwan*,

75 FR 41804 (July 19, 2010), and the accompanying I&D Memo at Comment 5. Contrary to Lloyds's argument, it is not our practice to impute credit expense as of the date that the invoice is first due for payment by the terms of sale or at the time when an invoice is issued for the relevant goods.

Lloyds relies on *Mittal* to argue that the credit-expense period should begin only at the point in time when an accounts receivable is entered on the respondent's books, *i.e.*, as of the date of the commercial invoice for transactions at issue, rather than as of the date of shipment (factory-invoice date). Lloyds's interpretation of the CAFC's statement does not take into account the full statement of the court. The court stated that credit expense relates to both the "costs associated with carrying accounts receivable on the books and the expenses related to extending credit to purchasers for the interim between shipping and payment." See *Mittal*, 548 F.3d at 1384 (quoting *AIMCOR v. United States*, 141 F.3d 1098, 1111 n.12. (CAFC 1998) (*AIMCOR*)). Lloyds's proposed period for determining the credit-expense period precludes the later "expenses related to extending credit" and focuses only on the former "costs of carrying receivables" portion of the court's statement. In this review, unlike the circumstances in *Mittal*, record evidence does not show that the respondent can sell the merchandise to another customer once it leaves the factory. For the sales at issue, Lloyds extends credit from the point when the goods are shipped from the factory and issues a factory invoice to reflect this fact. Therefore, the credit-expense period begins on the date of shipment.

It is appropriate to start the credit-expense period with the ex-factory date of shipment because, as of this date and in accordance with the CAFC's statement in *Mittal*, Lloyds is extending credit to its customer. This has long been our practice as is clear from the CAFC's statement in *AIMCOR* where, at 141 F.3d at 1105 n.12, the court explains that the Department uses credit expenses to account for the cost of extending credit to purchasers and carrying accounts receivables. The CAFC also recognized that "Commerce's established practice is to calculate credit expenses from the date of shipment to the date payment is received from the customer." *Id.* at 1104-5. The CAFC also states that "{a} company effectively extends credit to purchasers when it ships merchandise prior to payment." See *AIMCOR*, 141 F.3d at 1105, n.11. Further, the CAFC has stated that "{c}redit expenses are the costs associated with money being owed to the seller after the seller has sold its merchandise but before the customer has paid the seller." See *Mittal*, 548 F.3d at 1379. From these remarks, it is clear that the court recognizes that a receivable exists as of the date of shipment rather than the date on which the sale is booked. For these reasons, we disagree with Lloyds's argument to shorten the credit-expense period to the interim between the commercial-invoice date (when Lloyds books the receivable) and the date of payment because this shorter period does not take into account the expenses involved in extending credit after the merchandise leaves Lloyds's factory.

Therefore, we have used the date on which the merchandise left the factory as the beginning of the period and the date of payment as the end of the period for which we have imputed credit expense for direct sales.

## **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 results of this administrative review in the *Federal Register*.

AGREE //X//

DISAGREE \_\_\_\_\_

//Edward C. Yang//

Edward C. Yang  
Acting Deputy Assistant Secretary  
for Import Administration

//11/5/2010//

Date