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July 3, 2014

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

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

RE: Issues and Decision Memorandum for the Final Determination
of the Antidumping Duty Investigation of Steel Threaded Rod
from India

Summary

We analyzed the case and rebuttal briefs of interested parties submitted in this less than fair value (“LTFV”) investigation of steel threaded rod (“STR”) from India. This investigation covers two mandatory respondents: Mangal Steel Enterprises Limited, (“Mangal”) and Babu Exports. Babu Exports did not respond to our antidumping duty questionnaire. As a result of our analysis of the case briefs, rebuttal briefs, and verification, we made certain changes to the margin calculations for Mangal.¹ We recommend that you approve the positions we developed in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments and rebuttal comments by parties:

- Comment 1: Whether to Collapse Mangal and Corona Steel Industries Private Limited (“Corona”)
- Comment 2: Whether Mangal’s Sales are Constructed Export Price (“CEP”) Sales or Export Price (“EP”) Sales
- Comment 3: Whether the Department’s Targeted Dumping Regulation was Unlawfully Withdrawn and Must be Employed in This Investigation
- Comment 4: Application of the Alternative Methodology

¹ See “Analysis Memorandum, Final Determination of Sales at Less Than Fair Value,” (“Analysis Memo”) dated concurrently with this notice.



Background

On February 18, 2014, the Department of Commerce (“Department”) published the *Preliminary Determination*.² The period of investigation (“POI”) is April 1, 2012, through March 31, 2013. The Department conducted its cost verification of Mangal from February 17, 2014, through February 21, 2014, in Kolkata, India.³ The Department conducted its sales verification of Mangal from February 24, 2014, through February 28, 2014, in Kolkata, India.⁴ The Department conducted its CEP verification of Mangal’s U.S. affiliate, North American Steel Connection Inc. (“NASCO”), and NASCO’s U.S. affiliate, Worldwide Construction Products (“WCP”), on April 23, 2014, in Charlotte, North Carolina, and on April 24, 2014, through April 25, 2014, in Metairie, Louisiana, respectively.⁵ We invited interested parties to comment on the *Preliminary Determination*. All America Threaded Products Inc., Bay Standard Manufacturing Inc., and Vulcan Threaded Products Inc. (“Petitioners”) and Mangal both submitted their case briefs and rebuttal briefs on May 27, 2014, and June 2, 2014, respectively. We conducted a hearing on June 9, 2014.

Scope of the Investigation

The merchandise covered by this investigation is steel threaded rod. Steel threaded rod is certain threaded rod, bar, or studs, of carbon quality steel, having a solid, circular cross section, of any diameter, in any straight length, that have been forged, turned, cold-drawn, cold-rolled, machine straightened, or otherwise cold-finished, and into which threaded grooves have been applied. In addition, the steel threaded rod, bar, or studs subject to these investigations are nonheaded and threaded along greater than 25 percent of their total length. A variety of finishes or coatings, such as plain oil finish as a temporary rust protectant, zinc coating (*i.e.*, galvanized, whether by electroplating or hot-dipping), paint, and other similar finishes and coatings, may be applied to the merchandise.

Included in the scope of this investigation are steel threaded rod, bar, or studs, in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

- 1.80 percent of manganese, or
- 1.50 percent of silicon, or

² See *Steel Threaded Rod from India: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination*, 79 FR 9164 (February 18, 2014) (“*Preliminary Determination*”).

³ See the memorandum “Verification of the Cost of Production and Constructed Value Data Submitted by Mangal Steel Enterprises Ltd. in the Antidumping Duty Investigation of Steel Threaded Rod from India,” dated March 20, 2014.

⁴ See the memorandum “Verification of the Sales Response of Mangal Steel Enterprises Limited in the Antidumping Duty Investigation of Steel Threaded Rod from India,” dated March 19, 2014 (“*Mangal Sales Verification Report*”).

⁵ See the memorandum “Verification of the Sales Response of Mangal Steel Enterprises Limited, its U.S. Affiliate, North American Steel Connection Inc., and its Affiliate, in the Antidumping Duty Investigation of Steel Threaded Rod from India,” (“*CEP Verification Report*”), dated May 13, 2014.

- 1.00 percent of copper, or
- 0.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 1.25 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.012 percent of boron, or
- 0.10 percent of molybdenum, or
- 0.10 percent of niobium, or
- 0.41 percent of titanium, or
- 0.15 percent of vanadium, or
- 0.15 percent of zirconium.

Steel threaded rod is currently classifiable under subheadings 7318.15.5051, 7318.15.5056, 7318.15.5090 and 7318.15.2095 of the *Harmonized Tariff Schedule of the United States* (“HTSUS”). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Excluded from the scope of this investigation are: (a) threaded rod, bar, or studs which are threaded only on one or both ends and the threading covers 25 percent or less of the total length; and (b) threaded rod, bar, or studs made to American Society for Testing and Materials (“ASTM”) A193 Grade B7, ASTM A193 Grade B7M, ASTM A193 Grade B16, and ASTM A320 Grade L7. The HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope of this investigation is dispositive.

Discussion of the Issues

Comment 1: Whether to Collapse Mangal and Corona

Petitioners’ Comments:

- Petitioners argue that Mangal and Corona should be collapsed for the final determination pursuant to 19 CFR 351.401(f).
 - The Department found Mangal and Corona to be affiliated based on family ownership of each company by Garodia family members pursuant to section 771(33)(A) and (F) of the Tariff Act of 1930, as amended (“the Act”).
 - Corona has production facilities that can produce steel threaded rod.
 - Corona shipped steel threaded rod to the United States during the POI. In addition, Petitioners cite to their March 28, 2014 letter in which they claim that “. . . following the filing of the *Petitions* — both Mangal and Corona changed their operations so that they use the same transportation and logistics company for their shipments to the United States.”
 - The Garodia family grouping jointly owns and controls Mangal and Corona, and there exists a significant potential for manipulation because of the level of common ownership and management by this family grouping. The Department has previously found that the existence of the family group and the significant

controlling ownership by the family members is substantial evidence in support of the collapsing decision. In the *Alum Ex* investigation,⁶ the Department said that it was not required to find that companies in question acted in concert, only that there was potential for them to act in concert or out of common interests.

- In the 4th administrative review of *Fish Fillets* from Vietnam,⁷ the Department said that if the family grouping enjoys nearly total ownership and control over companies, that family grouping has “significant influence over the production and sales decisions of each of the entities” and even if there was no actual overlap of family members on the boards of directors or in management, the fact that members of the family grouping were in senior leadership supported “a determination that there is a significant potential for manipulation so that the companies should be collapsed.”
- Both Mangal and Corona are producers and/or exporters of merchandise under consideration.
- Significant controlling ownership by family members is substantial evidence in support of the collapsing decision.
- The lack of overlapping board members and managers is not dispositive in a case involving a family grouping.
- The Department collapsed companies based on familial relationships despite the absence of intertwined operations.
- The Department should apply facts available in its analysis of the relationships between Mangal and Corona because Corona failed to respond to requests made by both the Department and Mangal for information regarding its relationship, or lack thereof, with Mangal, and Mangal’s claims are all self-serving.

Mangal’s Rebuttal Comments:

- The Department should continue to find that collapsing Mangal and Corona is not warranted. A finding of affiliation is not a sufficient basis on which to collapse two entities.
 - The two family groupings that separately own/control Mangal and Corona are separate legal entities under Indian law, and there is no overlap in owners, board members, or managers.
 - The logistics company cited in Petitioners’ March 28, 2014 letter was chosen by the U.S. customer.
 - Cases cited by Petitioners in support of collapsing where families control multiple entities do not address the unique circumstances of this case, where family members who separately own/manage Mangal and Corona are “estranged” and have otherwise unique facts.

⁶ See *Aluminum Extrusions From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 18524 (April 4, 2011) (“*Alum Ex*”) and accompanying Issues and Decision Memorandum (“IDM”) at Comment 4.

⁷ See *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 11349 (March 17, 2009) (“*Fish Fillets*”), and accompanying IDM at Comment 5.

- In *Ferro Union v. United States*,⁸ the Court of International Trade (“CIT”) held that estrangement is not relevant for purposes of determining affiliation, but neither the CIT nor the Department have held that estrangement is irrelevant for purposes of the Department’s collapsing analysis.
 - The Mangal Garodias and the Corona Garodias have been estranged for many years as documented in a 1993 MOU, which divided and allotted the ownership and management of the family assets including Mangal and Corona.
- Petitioners’ argument would “in effect create an irrebuttable presumption that a blood relationship requires not only a finding of affiliation under the statute, but also requires the Department to collapse based on a finding of significant potential for price manipulation. There is no basis in the language of the statute or the regulations for such a presumption for purposes of a collapsing analysis.”
- Mangal submitted extensive information rebutting any presumption that there is a significant potential for price manipulation based on blood relationships and demonstrating that the two family groups do not have common interests.

Department’s Position: The Department “collapses” companies pursuant to 19 CFR 351.401(f), which states that the Department will “treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities,” and the Department “concludes that there is a significant potential for the manipulation of price or production.” 19 CFR 351.401(f)(2) explains the “factors” the Department “may consider” in “identifying a significant potential for the manipulation,” including:

- (i) The level of common ownership;
- (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
- (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

In the Preamble to the Department’s regulations, the Department explained that it “retained the word ‘significant’ with respect to the potential for manipulation,” because collapsing “upon finding any potential for price manipulation would lead to collapsing in all circumstances in which the Department finds producers to be affiliated. As indicated in paragraph (f), collapsing requires a finding of more than mere affiliation.”⁹ The Department stated that “in our view, these determinations are very much fact-specific in nature, requiring a case-by-case analysis, as reflected in the Department’s determinations in actual cases which are published in the *Federal Register*.” The Department agreed with commenters that “not all of the factors identified in paragraph (f) need be present in order to collapse affiliated producers.” The Department also

⁸ See *Ferro Union v. United States*, 44 F. Supp. 2d 1301, 1325-26 (CIT 1999).

⁹ See *Preamble, Final Rule*, 62 FR 27295, 27345-346 (May 19, 1997) (“Preamble”).

referred to the list as “non-exhaustive,” and that it “must consider future manipulation,” which was the reason it did not use the term “possible manipulation,” but instead the “potential for manipulation.”

The CIT recognized that when determining whether there is a significant potential for manipulation, all three factors listed in 19 CFR 351.401(f) are considered by the Department in light of the totality of the circumstances; no one factor is dispositive in determining whether to collapse the producers.¹⁰ Additionally, the Department looks for “relatively unusual situations, where the type and degree of relationship is so significant that {it} finds that there is a strong possibility of price manipulation.”¹¹ Moreover, in examining these factors as they pertain to a significant potential for manipulation, the Department considers both actual manipulation in the past and the possibility of future manipulation.¹² We have, therefore, examined all three factors with respect to the potential for future manipulation.

In the *Preliminary Determination*, we found that Corona was affiliated with Mangal and that Mangal and Corona should not be treated as a single entity pursuant to the Department’s collapsing analysis.¹³ For the final determination, the Department continues to find Mangal and Corona to be affiliated on the basis of family ownership in accordance with section 771(33)(A) and (F) of the Act, *i.e.*, one family member owns Corona and other family members own the majority of shares of Mangal.¹⁴ In addition, we continue to find that both Mangal and Corona are producers and/or exporters of merchandise under consideration in this investigation.¹⁵ However, for the reasons detailed in the Affiliation and Collapsing Memorandum issued for the *Preliminary Determination*, and detailed below, pursuant to 19 CFR 351.401(f)(2), for the final determination we continue to find that Mangal and Corona should not be collapsed and treated as a single entity.

In determining whether to treat Mangal and Corona as a single entity, for the final determination we continue to find that the family grouping holds majority ownership of Mangal and full ownership of Corona, both of which are producers and/or exporters of merchandise under consideration in this investigation. Therefore, in considering the level of common ownership pursuant to 19 CFR 351.401(f)(2)(i), we find common ownership of the majority of shares by the

¹⁰ See *Koyo Seiko Co., Ltd. v. United States*, 516 F. Supp. 2d 1323, 1346 (CIT 2007) (“*Koyo Seiko*”), citing *Light Walled Rectangular Pipe and Tube from Turkey; Notice of Final Determination of Sales at Less Than Fair Value*, 69 FR 53675 (September 2, 2004), and accompanying IDM at Comment 10.

¹¹ See *Koyo Seiko*, 516 F. Supp. 2d at 1346, citing *Nihon Cement Co. v. United States*, 17 C.I.T. 400, 426 (CIT 1993) (quoting *Final Determination of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 54 FR 18992, 19089 (May 3, 1989)).

¹² See *Preamble*, 62 FR at 27346.

¹³ See the memorandum “Affiliation and Collapsing, Mangal Steel Enterprises Limited and Corona Steel Industries Private Limited,” dated February 24, 2014 (Affiliation and Collapsing Memorandum); *Preliminary Determination*, and accompanying Preliminary Decision Memorandum at “Affiliation and Collapsing.”

¹⁴ See Mangal’s response to the Department’s section A supplemental questionnaire, “Steel Threaded Rod from India: Supplemental Section A Response,” dated January 3, 2014 (“Supplemental A Response”) at Exhibits S1-4(a) S1-4(b), Corona’s Annual Returns, and Exhibit S1-4(g), “100% Shareholding of Mangal Steel,” *see also* Mangal’s section A questionnaire response, “Steel Threaded Rod from India: Section A Response” (“Section A Response”), at Exhibits A-4(a), “Top Ten Shareholders of Mangal.”

¹⁵ *Id.*

family grouping. In this context, the family in question is the “person” jointly owning and controlling Mangal and Corona. We also note that evidence on the record indicates that Mangal and Corona are competitors and that there is no additional relationship between these two companies outside of the family grouping.

In regards to 19 CFR 351.401(f)(2)(ii), the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm, the record of this proceeding shows that both companies are owned, directed, and managed by members of a single family grouping. We also note that no individual managerial employees or board members of Mangal are managers or directors of Corona, and vice versa.

With respect to the third factor under 19 CFR 351.401(f)(2)(iii), the presence of intertwined operations, there continues to be no information on the record to indicate that the operation of these entities are intertwined. As explained in the Affiliation and Collapsing Memorandum that was issued for the *Preliminary Determination*, Mangal stated on the record that Corona is a competitor and that Mangal and Corona have no business relationship whatsoever.¹⁶ In turn, Corona stated that it has nothing to do with Mangal.¹⁷ Mangal certified to the accuracy of this characterization of the relationship between the two companies,¹⁸ and there is no evidence on the record contradicting these statements. Indeed, Mangal documented its failed attempts to contact Corona and obtain their cooperation (offering to bear Corona’s full cost of participation), and submitted evidence of this exchange as further confirmation of the competitive positions of the two companies and the absence of any potential for manipulation of price or production between Mangal and Corona.¹⁹ As part of the verification process described below, we thoroughly examined these claims and did not find any information in Mangal’s books and records that contradicts the claims.

Based on the totality of circumstances, we continue to find that there is no significant potential for manipulation between Mangal and Corona and that the two affiliates should not be collapsed into a single entity pursuant to 19 CFR 351.401(f). The finding is based on the case-specific facts of this proceeding, which, as a totality, show that the relationship of these two companies is not one that would warrant collapsing in this case. Since the *Preliminary Determination*, no additional information has been obtained that warrants altering the finding that Mangal and Corona should not be collapsed into a single entity. At the on-site verification of Mangal’s questionnaire response, we thoroughly examined Mangal’s books and records in this respect and found the record information concerning 19 CFR 351.401(f)(i) and (ii) to be accurate and supported by evidence. Further, with regard to 19 CFR 351.401(f)(iii), we found nothing indicating any transactions or intertwined operations with respect to Mangal and Corona. With regard to the latter, we examined Mangal’s customized enterprise resource planning (“ERP”) system, which included a combined debtor/creditor list which included all company names for Mangal’s debtors/creditors since 2001, the year Mangal’s ERP system was implemented. We

¹⁶ See Mangal’s January 28 Submission and Supplemental A Response.

¹⁷ See Corona’s January 17, 2014, Letter.

¹⁸ See Mangal’s January 28 Submission and Supplemental A Response.

¹⁹ *Id.*, at 3 and Exhibits 3-5.

noted no transactions among Corona, Suti Export Limited,²⁰ or any individual Garodia family member or other Garodia entities. We also examined “transfer invoices” from material suppliers maintained at Mangal’s production facilities dating back to the year 2005 and found nothing indicating any transactions or intertwined operations with respect to Mangal and Corona.²¹

After the *Preliminary Determination*, the Petitioners provided information indicating that Mangal used the same logistics company as Corona for certain shipments to the United States, for a limited number of shipments subsequent to the POI.²² However, we do not find that this information demonstrates, or indicates, cooperation or coordination between Mangal and Corona such that our finding of no significant potential for manipulation of price or production should be altered. Further, at verification, we found no evidence of any sort of a relationship, communication, or intertwined operations between Mangal and Corona.

In response to Mangal’s arguments about “estrangement of family members,” the personal relations of the brothers and their families at issue in this case are not a factor upon which we are making our final determination not to collapse Mangle and Corona. While it is true that *Ferro Union* does not address the possible relevance of estrangement with respect to collapsing, we find that the evidence on the record of this investigation does not conclusively demonstrate whether or not the family is estranged. The 1993 Garodia memorandum of understanding (“MOU”), for example, merely prescribes the division of assets without reference to the family’s motivation for doing so. Furthermore, nothing in the MOU specifically precludes cooperation among Garodia family members, and nothing precludes the execution of a revised memorandum of understanding which could provide for cooperation among family members in the future. If this investigation results in the imposition of an antidumping duty order, and Mangal and/or Corona are subject to administrative review, we will continue to inquire into the relationship between Corona and Mangal.

With respect to Petitioners’ argument that facts available should be used with respect to the analysis of the relationship between Mangal and Corona, pursuant to section 776(a) and (b) of the Act, we disagree. Petitioners assert that Corona failed to respond to the Department’s requests for information and, therefore, the Department lacks information about Corona’s operations and Corona’s relationships with Mangal from Corona’s perspective. Since Mangal provided full questionnaire responses regarding its own data and information, we find that the record contains the information necessary to accurately calculate Mangal’s dumping margin. Thus, it is not necessary to apply facts available pursuant to section 776 of the Act. Further, we find that Mangal cooperated fully with all of the Department’s requests for information, including those regarding the relationship between Mangal and Corona, making reliance on an adverse inference pursuant to section 776(b) of the Act inappropriate. As outlined above,

²⁰ At the time of the execution of the MOU, Corona Steel Industry Private Limited was known as Suti Export Limited. See Mangal’s section A supplemental questionnaire response (“Supplemental A Response”) dated January 3, 2014 at page 12.

²¹ See Mangal Sales Verification Report dated March 19, 2014, at item II. E.

²² See Petitioners’ letter, “Antidumping Investigation of Steel Threaded Rod from India — Petitioners’ Deficiency Comments on Response of Mangal Steel to Third Supplemental Section C of Antidumping Duty Questionnaire,” dated March 28, 2014, at 2, and Mangal’s letter, “Steel Threaded Rod from India: Request for Rejection of Petitioners’ March 28, 2014 Deficiency Comments and Reply to Certain Comments,” dated April 1, 2014, at 3.

Mangal was diligent in its attempts to gain information regarding Corona.²³ Mangal alerted the Department to the familial relationship between itself and Corona and that it and Corona had similar product lines in its section A questionnaire response.²⁴ In addition, Mangal obtained Corona's 2012 annual returns and 2012 – 2013 financial statements from Indian governmental authorities and submitted them for the record.²⁵ We found no information in those financial statements that would support finding any intertwined operations.

The previous reviews and investigations cited by the Petitioners where the Department stated that a family grouping with significant controlling ownership amounts to substantial evidence in favor of collapsing²⁶ are distinguishable from the circumstances in this investigation. In *Fish Fillets*, the Department stated that “. . . the Department agrees that common family ownership is in and of itself insufficient to make a collapsing determination . . .” Further, in *Fish Fillets*, the Department found that there was a potential for intertwined operations based on the existence of an arrangement between one of the collapsed companies and the others to process frozen fish fillets for export to the United States prior to the period of review (“POR”), that the company continued to process frozen fish fillets (not for its affiliate) during the POR, and that the company had an import-export registration during the POR.²⁷ Here, there is no evidence that Mangal or Corona engage in sales, processing, or production activities on behalf of the other company.

We similarly find the totality of circumstances that existed in *Isos* and *Alum Ex* to be different from the situation that exists in this investigation of steel threaded rod from India. For example in *Isos*, the *complete* ownership by the family grouping of the companies played a role in our decision to collapse.²⁸ In this case, Mangal has a significant number of shareholders who are not Garodia family members.²⁹ In *Alum Ex*, in addition to familial relations among the companies, the Department found evidence of intertwined operations at verification.³⁰

Comment 2: Whether Mangal's Sales are CEP Sales or EP Sales

Mangal's Comments:

- Mangal argues that all sales it made through NASCO, including those through WCP, should be treated as EP sales. The form of affiliation the Department found for sales made through NASCO is qualitatively different from other types of affiliation, such as affiliation through

²³ See Mangal's January 28, 2014 letter “Steel Threaded Rod from India: Letter Regarding Corona,” at Exhibits two, three and four.

²⁴ See Mangal's Section A Response at pages A-7 – A-8.

²⁵ See Mangal's Supplemental A Response at Exhibits S1-4(a) and (b), and Exhibit S1-5(b), respectively.

²⁶ In addition to citing the *Fish Fillets*, and accompanying IDM at Comment 5 and the *Alum Ex*, and accompanying IDM at Comment 4, petitioners also cite to *Chlorinated Isocyanurates From the People's Republic of China: Final Results of June 2008 Through November 2008 Semi-Annual New Shipper Review*, 74 FR 68575 (December 28, 2009) (“*Isos*”) and accompanying IDM at Comment 3.

²⁷ See *Fish Fillets*, and accompanying IDM at Comment 5.

²⁸ See *Isos*, and accompanying IDM at Comment 3.

²⁹ See Mangal's Supplemental A Response at Exhibit S1-4 (g), “100% shareholding of Mangal Steel.”

³⁰ See *Alum Ex*, and accompanying IDM at Comment 4.

ownership, where any benefit accruing to a subsidiary can also be presumed to benefit the parent.

- There is no ownership of NASCO by Mangal (or vice versa) or any form of control that allows Mangal to exercise restraint or direction over NASCO's business.
- The Department's decision to find NASCO and Mangal to be affiliated based on a principal/agent relationship in accordance with section 771(33)(G) of the Act was based entirely on the Department's finding that Mangal controlled the price and terms of sale for certain subject merchandise.
 - If Mangal was in control of the price and the terms of sale, Mangal set the terms of sale for the end U.S. customer, not NASCO/WCP, in India, prior to importation, and thus Mangal is the seller to the end customer in the United States and the sales should be considered EP sales.
 - Although Mangal issued the invoices to NASCO, the terms of the sale to the end customer had already been set, and there was no difference in the invoice price from Mangal Steel to NASCO and the price on the purchase order from the U.S. customer.
 - Although NASCO took title to the merchandise in the United States, it did not actually receive any consideration or benefit from the U.S. customer.
 - There is no purpose served by treating the sales in question as CEP transactions.
 - The CEP methodology is designed to prevent foreign producers from competing unfairly in the U.S. market by inflating the U.S. price with amounts spent by the U.S. affiliate on marketing and selling the products in the United States.
 - The U.S. price to the end customer is set by Mangal in India, and there are no additions or inflations of the price by NASCO.
- If the Department determines that certain sales made by Mangal through NASCO should be considered CEP sales, the Department should find that sales to WCP are EP sales.
 - Mangal and WCP do not have a principal/sales agent relationship.
 - Mangal's "alleged" control over the price of certain U.S. sales does not exist with respect to sales made by WCP.
 - An analysis of WCP's relationship to Mangal based on the seven points used to determine affiliation between Mangal and NASCO demonstrates that there is no principal/sales agent relationship between Mangal and WCP, and they should not be treated as affiliated parties.
 - The foreign producer had no role in negotiating WCP's price and other terms of sale to its end customer;
 - Mangal had no interaction with WCP's U.S. customers;
 - WCP maintained inventory of merchandise under consideration;
 - NASCO took title to the merchandise and bears the risk of loss;
 - NASCO further processes and cuts the merchandise under consideration to length.
 - Mangal is not involved in marketing with respect to WCP's customers.

- The identity of the producer found on the sales documentation does not infer an agency relationship.

Petitioners' Rebuttal Comments:

- NASCO is a full-fledged affiliate of Mangal, and its U.S. sales are properly classified as CEP sales.
 - Mangal does not dispute the Department's finding that NASCO and Mangal are affiliated pursuant to section 771(33)(G) of the Act whereby parties are affiliated through control. However, Mangal attempts to distinguish the affiliation as somehow less than is required to permit CEP treatment. Affiliation should be viewed as a "yes or no" question, and when a buyer and a seller are affiliated, the price to the affiliate cannot be considered for the dumping analysis.
 - The downstream sale by NASCO to the first unaffiliated U.S. buyer must be reported.
 - NASCO'S expenses must be considered in determining the net price received by Mangal.
 - The statute expressly contemplates CEP classification of sales whether they occur before or after importation.
 - With the involvement of a U.S.-based affiliate, in selling functions (*i.e.*, booking the sale in its accounting records, invoicing the customer, and collecting payment), the sale should be deemed to have occurred "in the United States," even if there was also some involvement by Mangal in India.
 - With respect to sales made by WCP from inventory, the sales obviously occurred in the United States and, thus, are properly classified as CEP sales.
 - Appropriate classification of NASCO's sales as CEP or EP is not immaterial.
 - One of the principal elements of the CEP calculation is the adjustment to account for expenses incurred in the operation of the affiliate, *i.e.*, indirect selling expenses incurred by NASCO as contemplated by section 772(d) of *Act*.

Department's Position: For the final determination, we continue to find, as we did in the *Preliminary Determination*, that Mangal and NASCO were affiliated during the POI based on a principal/agent relationship for sales made by Mangal to the U.S. end customer through NASCO.³¹ Additionally, we determine that in this case, the totality of the circumstances renders Mangal's sales through NASCO to be CEP sales.

Mangal claims that the Department previously determined that exports to an affiliated importer do not require a finding that the sales in question are CEP transactions, but that the location of a sale or transaction is paramount in determining whether or not a sale should be classified as EP

³¹ See *Preliminary Determination*, and accompanying Preliminary Decision Memorandum at 13 through 18.

or CEP.³² Mangal also argues that in relying on section 771(33)(G) of the Act, the Department relied on the control of terms of sale by Mangal in its determination that Mangal and NASCO were affiliated. Mangal argues that if it controlled the sale, the sale was therefore executed by Mangal in India, and should be classified as an EP sale.

Mangal misinterprets the Department's analysis in the *Preliminary Determination*, however. The Department cited control in its determination to consider Mangal and NASCO affiliated only to the extent that NASCO negotiated sales to its customers based on Mangal's price list and that Mangal required NASCO to obtain its approval to sell at prices below those on the price list. Furthermore, in some cases, Mangal negotiated and set terms of sale directly with NASCO's end customer. These sales were facilitated because NASCO introduced Mangal to these customers and was compensated for doing so. The Department found that Mangal has control over NASCO and therefore found them to be affiliated pursuant to section 771(33)(G) of the Act.

The Act defines 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."³³ On the other hand, the Act defines CEP as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter..."³⁴

In *AK Steel*, the Federal Circuit held that "while a sale made by a producer or exporter could be either EP or CEP, one made by a U.S. affiliate can only be CEP. Limiting affiliate sales to CEP flows logically from the geographical restriction of the EP definition, as a sale executed in the United States by a U.S. affiliate of the producer or exporter to a U.S. purchaser could not be a sale 'outside the United States.' The location of the sale and the identity of the seller are critical to distinguishing between the two categories."³⁵ Additionally, the court in *AK Steel* stated, "if the importer and the producer/exporter are affiliated, then the first sale to an *unaffiliated* party is necessarily the sale between the affiliated importer and the unaffiliated purchaser..."³⁶ Because we found NASCO, a U.S. company located in Metairie, Louisiana, to be affiliated with Mangal, the sales from NASCO to the unaffiliated customer are the first sales to an unaffiliated party, and thus properly classified as CEP. In this regard, the evidence on the record demonstrates that these sales occurred in the United States by NASCO because NASCO invoices the end customer and the end customer remits payment, or provides consideration, to NASCO.³⁷

³² Mangal references as part of its argument that the location of the sale is paramount "*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 IDM at Comment 22 (citing *AK Steel Corp. v. United States*, 226 F.3d 1361, 1367-74 (Fed. Cir. 2000) ("*AK Steel*").

³³ See section 772(a) of the Act.

³⁴ See section 772(b) of the Act.

³⁵ See *AK Steel*, 226 F.3d 1361 at 1371.

³⁶ *Id.*

³⁷ See NASCO's Section A Response at pages A-18 – A-19 and see e.g. sales verification exhibits VE-9, VE-10, and VE-11.

Mangal claims that NASCO did not make the sale to the unaffiliated party because there was not both a transfer of ownership and consideration in its sales to the end customer.³⁸ Mangal argues that NASCO receives no consideration from the end customer -- that the invoice NASCO issues to the end customer lists the same value as the invoice issued by Mangal to NASCO, so therefore no consideration exists. However, no party contests that NASCO invoices the end customer and the end customer remits payment, or provides consideration, to NASCO.³⁹ Consistent with the CIT's analysis *Corus Staal*, we find that a transfer of ownership occurred and consideration was provided in all of these transactions between NASCO and the end customer. Specifically, regardless of whether it included any markup in price by NASCO, the end customer paid. Furthermore, only subsequent to the payment by the end customer and receipt of the goods by the end customer, does NASCO receive consideration from Mangal based directly on the sales value to the end customer. The consideration paid by Mangal to NASCO constitutes an invoice markup from which NASCO covers expenses and obtains its profits.⁴⁰ The higher the price NASCO negotiates with the end customer, the higher its revenue with respect to each sale.

Mangal also argues that the sale was made in India because title passed from Mangal to NASCO at the port of import. However, an invoice issued by Mangal to NASCO, Exhibit VE-10 of Mangal's sales verification exhibits, and notes in Mangal's 2011 - 2012, and 2012 - 2013 financial statements,⁴¹ demonstrate that NASCO does not have title to the merchandise at the time of sale to its end customer.⁴² NASCO invoices the end customer who remits payment to NASCO.⁴³ Then NASCO remits payment to Mangal on the basis of Mangal's invoice to NASCO.⁴⁴

NASCO issued its invoices to its end customers and received payment prior to making payment to Mangal.⁴⁵ Both a transfer of ownership and consideration first occurred between NASCO and its end customer in the United States. NASCO does not pay Mangal until after NASCO has transferred the merchandise to its end customer and NASCO has received payment from its end customer.⁴⁶ From NASCO's customer's perspective, it obtained title/ownership when it remitted payment to NASCO. Thus, the first occurrence of transfer of merchandise and consideration to an unaffiliated party occurred in the United States.

With respect to sales from Mangal to NASCO, and then through WCP, in the *Preliminary Determination*, we stated that:

³⁸ For support of this claim, Mangal cites *Corus Staal BV v. United States DOC*, 27 C.I.T. 386, 392 (Ct. Int'l Trade 2003) ("*Corus Staal*") wherein the CIT found that merchandise is "sold" when there is "both a transfer of ownership and consideration."

³⁹ See Mangal's Section A Response at page A-19 and CEP Verification Report at item II. C.

⁴⁰ See Section A Response at page A-19.

⁴¹ See Exhibits A-8(a) and A-8(b), respectively of Mangal's section A questionnaire response, "Steel Threaded Rod from India: Section A Response," dated October 21, 2013.

⁴² See Analysis Memo for further explanation which includes discussion of business proprietary information.

⁴³ See Mangal's Section A Response at page A-19 and CEP Verification Report at item II. C.

⁴⁴ *Id.* and see sales verification exhibits VE-9, VE-10, and VE-11.

⁴⁵ See, e.g., sales verification exhibits VE-9, VE-10, and VE-11.

⁴⁶ See CEP sales verification Exhibit 7, "Nasco Preselects," which shows the payment terms from Mangal to Nasco, and from Nasco to its end customer.

Regardless of the aforementioned fact pattern, these direct sales by Mangal to NASCO do not represent the first sale to an unaffiliated party and, thus, should be treated as CEP transactions pursuant to section 772(b) of the Act. However, because the record does not currently contain information necessary to calculate the CEP (*e.g.*, the downstream price information for sales to the first unaffiliated customer), we determine that these sales should be treated as EP sales as facts otherwise available, pursuant to section 776(a) of the Act, for the preliminary determination. However, we intend to collect the information necessary to value these sales as CEP for the final determination.⁴⁷

When the Department issued the *Preliminary Determination*, there was no clear ownership information on the record of this investigation regarding WCP. Thus we lacked information necessary to determine the nature of the NASCO-WCP relationship, *i.e.*, whether, and to what extent NASCO and WCP were affiliated, and as facts available, in accordance with section 776(a) of the Act, preliminarily treated WCP's sales as EP sales. In a post-preliminary determination supplemental questionnaire, Mangal reported that NASCO and WCP were 100 percent owned by the same individual, Mr. Kumar Banerjee, who also acts as the accountant for both companies.⁴⁸ We verified this point during the CEP verification.⁴⁹ Thus, through WCP's affiliation with NASCO, we find that WCP is also affiliated with Mangal. NASCO and WCP are affiliated under section 771(33) (F) of the Act. NASCO and WCP are both under the control of Mr. Kumar Banerjee. Mr. Banerjee is the president of NASCO⁵⁰ and the sole managing partner of WCP.⁵¹

Moreover, the first sale to an unaffiliated party did not occur until WCP sold the merchandise under consideration to its end customer. For sales by WCP, NASCO purchased the merchandise from Mangal and held it in WCP's inventory for sale to the end customer. Therefore for sales through WCP, the first sale to an unaffiliated party is made by WCP in the United States, and we have treated WCP's sales as CEP sales.⁵²

⁴⁷ See *Preliminary Determination*, and accompanying Preliminary Decision Memorandum at 18.

⁴⁸ See Mangal's supplemental questionnaire response, "Steel Threaded Rod from India: Supplemental Questionnaire Response Concerning Mangal's March 18, 2014, Section C Supplemental Questionnaire," dated April 18, 2014 ("April 18 Supplemental Response") at page 4 and CEP Verification Report.

⁴⁹ *Id.* at item II. C.

⁵⁰ See Mangal's April 18 Supplemental Response at pages 6 and

⁵¹ *Id.* at page 6.

⁵² On February 18, 2014, the Department requested that Mangal report its sales through WCP as CEP sales. See the Department's supplemental questionnaire dated February 18, 2014. Mangal reported WCP's sales as CEP sales on March 18, 2014. See Mangal's supplemental questionnaire response dated March 18, 2014, "Steel Threaded Rod from India: Third Supplemental Questionnaire Response Section C (CEP Sales)."

Comment 3: The Department's Targeted Dumping Regulation was Unlawfully Withdrawn and Must be Employed in This Investigation

Mangal's Comments:

- The Department should utilize the targeted dumping regulations for the final determination or at least only apply the differential pricing analysis to targeted sales only as required by the targeted dumping regulations.
 - The CIT in *Gold East Paper v. United States*,⁵³ as described subsequently in *Baroque Timber*,⁵⁴ found that the Department's targeted dumping regulations at 19 CFR 351.414(c)(2) were not properly legally withdrawn.
 - The regulation was properly withdrawn on May 22, 2014, subsequent to the initiation and preliminary determination of this investigation.
 - No allegation of targeted dumping was made in this investigation, while under the old regulations, the Department would "normally" only conduct a targeted dumping analysis if a claim of targeted dumping was made.

Petitioners' Rebuttal Comments:

- The Department noted in the *Federal Register* notice regarding the withdrawal of its targeted dumping regulations that the final modification of its procedures for calculating dumping margins applies to "all preliminary determinations . . . issued after April 16, 2012."
 - That final modification contemplates the use of "a comparison methodology . . . which will necessarily include any exceptional or alternative comparison methods that are determined appropriate to address case-specific circumstances."
 - Such comparison methods include the differential pricing analysis that the Department applied in its preliminary determination in this investigation.

Department's Position: The Department disagrees with Mangal's claim that 19 CFR 351.414 (2007) was in effect when this investigation was initiated.⁵⁵ The CIT's holding in *Gold East* is not final and conclusive, as this matter is currently pending litigation.⁵⁶ Furthermore, the targeted dumping regulation was properly withdrawn pursuant to the Administrative Procedures Act ("APA"). During the withdrawal process, the Department engaged the public to participate in its rulemaking process. The process was done with proper notice and opportunity to comment, and no party could reasonably have been left with the impression that the Department would be bound by the withdrawn targeted dumping regulations. In fact, the Department's

⁵³ See *Gold East Paper v. United States*, 918 F. Supp. 2d 1317, 1327-28 (CIT 2013) ("*Gold East*").

⁵⁴ See *Baroque Timber Industries (Zhongshu) v. United States*, 925 F. Supp. 2d 1332, 1340 (CIT 2013) ("*Baroque Timber*").

⁵⁵ See *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008) ("2008 Withdrawal"). This withdrawal only applied to 19 CFR 351.414(d)(5), 351.414(f), and 351.414(g).

⁵⁶ In *Baroque Timber v. United States*, the CIT opined in *dicta* on the earlier CIT decision, *Gold East*. See *Baroque Timber*, 925 F. Supp. 2d at 1340, n. 10. By its own statement, however, the CIT did "not reach the merits of the Plaintiff's targeted dumping challenges," so the CIT's description of the *Gold East* decision in that decision is of no bearing on the Department's withdrawal of its targeted dumping regulations.

withdrawal of its regulations in December 2008 came after two rounds of soliciting public comments on the appropriate targeted dumping analysis.

The Department solicited the first round of comments in October 2007, more than one year before it withdrew the regulation, by posting a notice in the *Federal Register* seeking public comments on what guidelines, thresholds, and tests it should use in conducting an analysis under section 777A(d)(1)(B) of the Act.⁵⁷ As the notice explained, because the Department received very few targeted dumping allegations under the regulations then in effect, it solicited comments from the public to determine how best to implement the remedy provided under the statute to address masked dumping. The notice posed specific questions, and allowed the public 30 days to submit comments. Various parties submitted comments in response to the Department's request.⁵⁸ After considering those comments, the Department published a proposed new methodology in May 2008 and again requested public comment.⁵⁹ Among other things, the Department specifically sought comments "on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping."⁶⁰ Several of the submissions⁶¹ received from parties explained that the Department's proposed methodology was inconsistent with the statute and should not be adopted.⁶² Moreover, several entities explicitly stated that the Department should not establish minimum thresholds for accepting allegations of targeted dumping because the statute contains no such requirements.⁶³

These comments suggested that the regulation was impeding the development of an effective remedy for masked dumping. Indeed, after considering the parties' comments the Department explained that because "the provisions were promulgated without the benefit of any experience on the issue of targeted dumping, the Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."⁶⁴ For this reason, the Department determined that the regulation had to be withdrawn.⁶⁵ Although this withdrawal was effective immediately, the Department again invited parties to submit comments,

⁵⁷ See *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 FR 60651 (October 25, 2007).

⁵⁸ See Public Comments Received December 10, 2007, Department of Commerce, <http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html> (December 10, 2007) (listing the entities that commented).

⁵⁹ See *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 FR 26371, 26372 (May 9, 2008) ("*Proposed Methodology*"). On June 9, 2008, the Department extended the original June 9, 2008 due date for comments by ten business days to give more parties an opportunity to make submissions. See *Request for Comment and Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 FR 32557 (June 9, 2008).

⁶⁰ See *Proposed Methodology*, 73 FR at 26372.

⁶¹ The public comments received June 23, 2008 and submitted on behalf of several domestic parties can be accessed at: <http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html>.

⁶² See, e.g., "Comments on Targeted Dumping Methodology, Comments," (Interested Party Comments) dated June 23, 2008, at 2.

⁶³ See, e.g., letter from Committee to Support U.S. Trade Laws, to the Department: "Comments on Targeted Dumping Methodology" at 25; see also Interested Party Comments at 29.

⁶⁴ See 2008 Withdrawal.

⁶⁵ *Id.*

and gave them a full 30 days to do so.⁶⁶ The comment period ended on January 9, 2009, with several parties submitting comments.⁶⁷

The course of the Department's decision-making demonstrates that it sought to actively engage the public. This type of public participation is fully consistent with the APA's notice-and-comment requirement.⁶⁸ Moreover, various courts have rejected the idea that an agency must give the parties an opportunity to comment before every step of regulatory development.⁶⁹ Rather, where the public is given the opportunity to comment meaningfully consistent with the statute, the APA's requirements are satisfied. The touchstone of any APA analysis is whether the agency, as a whole, acted in a way that is consistent with the statute's purpose.⁷⁰ Here, similar to the agency in the D.C. Circuit decision, *Mineta*, the Department provided the parties more than one opportunity to submit comments before issuing the final rule.⁷¹ As in *Mineta*, the Department also considered the comments submitted and based its final decision, at least in part, upon those comments. Just as the court in *Mineta* found all of those facts to indicate that the agency's actions were consistent with the APA, so too the Department's actions here demonstrate that it fulfilled the notice and comment requirements of the APA.⁷²

The APA does not require that a final rule that the agency promulgates must be identical to the rule that it proposed and upon which it solicited comments.⁷³ Here, the Department actively engaged the public in its rulemaking process; it solicited comments and considered the submissions it received. In fact, that the numerous comments prompted the Department to withdraw the regulation demonstrates that the Department provided the public with an adequate opportunity to participate. In doing so, the Department fully complied with the APA.

Further, even if the two rounds of comments that the Department solicited before the withdrawal of the regulation were insufficient to satisfy the APA's requirements, the Department properly declined to solicit further comments pursuant to the APA's "good cause" exception. This exception provides that an agency is not required to engage in notice and comment if it determines that doing so would be "impracticable, unnecessary, or contrary to the public interest."⁷⁴ The Federal Circuit recognized that this exception can relieve an agency from issuing notice and soliciting comment where doing so would delay the relief that Congress intended to provide; in *National Customs Brokers*, the Federal Circuit rejected a plaintiff's argument that the U.S. Customs Service failed to follow properly the APA in promulgating

⁶⁶ *Id.*

⁶⁷ See Public Comments Received January 23, 2009, Department of Commerce, (Jan. 23, 2009).

⁶⁸ See, e.g., *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299-1300 (D.C. Cir. 2000) (holding that the EPA's decision to not implement a rule upon which it had sought comments did not violate the APA's notice and comment requirements because the parties should have understood that the agency was in the process of deciding what rule would be proper).

⁶⁹ See *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) ("*Mineta*") (holding that the Department of Transportation's promulgation of four rules, each with immediate effect, only after the issuance of which the public was given the opportunity to comment, afforded proper notice and comment).

⁷⁰ *Id.*

⁷¹ *Id.*, at 119.

⁷² *Id.*

⁷³ See, e.g., *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

⁷⁴ See 5 U.S.C. 553(b)(B).

certain interim regulations when it published these regulations without giving the parties a prior opportunity to comment.⁷⁵ Moreover, although the U.S. Customs Service solicited comments on the published regulations, it stated that it “would not consider substantive comments until after it implemented the regulations and reviewed the comments in light of experience” administering those regulations.⁷⁶ The U.S. Customs Service explained that “good cause” existed to comply with the APA’s usual notice and comment requirements because the new requirements did not impose new obligations on parties, and emphasized its belief that the regulations should “become effective as soon as possible” so that the public could benefit from “the relief that Congress intended.”⁷⁷ The Federal Circuit recognized that this explanation was a proper invocation of the “good cause” exception and explained that soliciting and considering comments was both unnecessary (because Congress passed a statute that superseded the regulation) “and contrary to the public interest because the public would benefit from the amended regulations.”⁷⁸ For this reason, the Court affirmed the regulation against the plaintiff’s challenge.⁷⁹

In short, the regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy to unmask dumping. Such effect would have been contrary to congressional intent. The Department’s revocation of such a regulation without additional notice and comment was based upon a recognized invocation of the “public interest” exception. Accordingly, there was no basis for the Department to base its analysis in the instant proceeding upon the withdrawn regulation.⁸⁰

Most recently, as Mangal points out, in the *Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 79 FR 22371 (April 22, 2014) (“*Non-Application Final Rule*”), the Department withdrew the targeted dumping regulations and stated that it had sought input on “. . . whether to reinstate the regulations or to continue to treat them as withdrawn.”⁸¹ In addition, the Department stated that it determined to “. . . continue not to apply the withdrawn targeted dumping regulations in less-than-fair-value investigations.”⁸² These statements made it clear that the Department considered the targeted dumping regulation already withdrawn.

Comment 4: Application of the Alternative Methodology

Mangal’s Comments:

- If the Department does apply the alternative methodology (*i.e.*, average-to-transaction comparisons), the Department may only apply it to targeted dumped sales, consistent with the now-withdrawn regulations.

⁷⁵ See, e.g., *National Customs Brokers and Forwarders Ass’n of Am., Inc. v. United States*, 59 F.3d 1219, 1223 (Fed. Cir. 1995) (“*National Customs Brokers*”).

⁷⁶ *Id.*, at 1220-21.

⁷⁷ *Id.*, at 1223.

⁷⁸ *Id.*, at 1224 (emphasis).

⁷⁹ *Id.*

⁸⁰ As a result of the withdrawal of the targeted dumping regulation, we note that the Department no longer requires the petitioners to submit an allegation of targeted dumping before conducting its analysis.

⁸¹ See *Non-Application Final Rule*, 79 FR at 22371.

⁸² *Id.*

Department's Position: The Department disagrees with Mangal's argument that the Department may only apply the average-to-transaction ("A-to-T") method to "targeted dumped sales." Pursuant to 19 CFR 351.414(c)(1), the Department calculates dumping margins by comparing weighted-average NVs to weighted-average EPs or CEPs (the average-to-average, or A-to-A, method), unless the Secretary determines that another method is appropriate in a particular situation. In antidumping proceedings, the Department examines whether to use the A-to-T method as an alternative comparison method using an analysis consistent with section 777A(d)(1)(B) of the Act. In order to determine which comparison method to apply, in the *Preliminary Determination* and other recent proceedings, pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act, the Department applied a "differential pricing" ("DP") analysis to determine whether application of A-to-T comparisons is appropriate.⁸³

The SAA expressly recognizes that the statute "provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring."⁸⁴ As the SAA implies, the Department is not tasked with determining whether targeted dumping is, in fact, occurring. Rather, the SAA recognizes that targeted dumping may be occurring where there is a pattern of prices that differ significantly among purchasers, regions, or time periods. In our view, the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method or the transaction-to-transaction method is the appropriate tool to measure whether, and if so to what extent, a given respondent is dumping the merchandise at issue.⁸⁵ While targeting may be occurring with respect to such sales, it is not a requirement nor a precondition for the Department to otherwise determine that the A-to-T method is warranted.

19 CFR 351.414(c)(1) states that the Department "will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case." In order to determine whether the A-to-A method is an appropriate tool with which to measure the extent of a respondent's dumping, or whether the Department should use an alternative comparison method in a given situation, the Department looks to section 777A(d)(1)(B) of the Act. Section 777A(d)(1)(B)(i) of the Act requires that there exists "a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions, or periods of time." The statute does not direct the Department how the determination of such a pattern should be accomplished and left this to the Department's discretion. The statute simply states that a pattern of prices is one that "differs significantly," and the Department reasonably demonstrated that such a pattern exists in its application of the Cohen's *d* and ratio tests in this investigation. Further, the statute states that the Department may apply the A-to-T method if "there is a *pattern of export prices . . .* for comparable merchandise that *differ* significantly among purchasers, regions, or periods of time," and the Department "explains why *such*

⁸³ See, e.g., *Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33350 (June 4, 2013), and accompanying IDM at Comment 3; and *Hardwood and Decorative Plywood From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013) ("*Hardwood Plywood*"), and accompanying IDM at Comment 3.

⁸⁴ See SAA at 843.

⁸⁵ 19 CFR 351.414(c)(1).

differences cannot be taken into account” using the A-to-A comparison method.⁸⁶ The statute directs the Department to consider whether there exists a pattern of prices that differ significantly. The statutory language references prices that “differ” and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that the Department consider only higher-priced sales or only lower-priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department explained that higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis.⁸⁷

Further, section 777A(d)(1)(B)(i) of the Act makes no provision for the comparison of the U.S. sales with NVs. Higher- or lower-priced sales could be dumped or could be masking other dumped sales. However, the relationship between higher or lower U.S. prices and their comparable NVs is not relevant in the Cohen's *d* test and in answering the question of whether there is a pattern of prices that differ significantly because this analysis includes no comparisons with NVs and section 777A(d)(1)(B)(i) of the Act contemplates no such comparisons. By considering all sales, higher-priced sales and lower-priced sales, the Department is able to analyze an exporter's pricing to identify whether there is a pattern of prices that differ significantly. Indeed, when greater than their NV, higher-priced sales will offset lower-priced sales when using the A-to-A method, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, which can mask dumping. Therefore, the inclusion of higher-priced sales which are found to differ significantly does not contradict the statute and may be relevant in determining whether there is the potential for masked dumping and whether the A-to-A method is appropriate for the given situation.

As explained in the *Preliminary Determination*, and accompanying Preliminary Decision Memorandum at 19, the purpose of the Cohen's *d* test is to evaluate the extent to which the net prices to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise. When 66 percent or more of the value of a respondent's U.S. sales are found to establish a pattern of prices that differ significantly, then the Department finds that the extent of these price differences through the pricing behavior of the respondent does not permit the segregation of the sales which constitute the identified pattern or prices that differ significantly from those that do not. Accordingly, the Department determines that considering the application of the A-to-T method to all U.S. sales is reasonable. Further, when 33 percent or less of the value of a respondent's U.S. sales constitute the identified pattern of prices that differ significantly, then the Department considers this extent of the pattern to not be significant in considering whether the A-to-A method is appropriate and does not consider the application of the A-to-T method as an alternative comparison method. When between 33 percent and 66 percent of the value of a respondent's U.S. sales constitute a pattern of prices that differ significant, the Department considers the extent of this pattern to be meaningful to consider whether the A-to-A method is appropriate, but also finds that segregating these sales from those sales which are not part of the identified pattern to be reasonable and then only

⁸⁶ See section 777A(d)(1)(B) of the Act (emphasis added).

⁸⁷ See *Hardwood Plywood*, and accompanying IDM at Comment 5.

considers the application of the A-to-T method as an alternative comparison method to this limited portion of a respondent's U.S. sales.

For the final determination, based on the results of the DP analysis, the Department continues to find that over 66 percent of Mangal's U.S. sales pass the Cohen's *d* test, which confirms the existence of a pattern of EPs (or CEPs) for comparable merchandise that differ significantly among purchasers, regions or time periods. Further, the Department determines that the A-to-A method cannot appropriately account for such differences because there is a meaningful difference (*i.e.*, more than 25 percent) between the margin calculated using the A-to-A method and the margin calculated using the alternative A-to-T method, as applied to all U.S. sales. Accordingly, the Department has determined to use the A-to-T method for all U.S. sales to calculate the weighted-average dumping margin for Mangal.

Recommendation

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

✓

Agree

Disagree



Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

July 3, 2014
(Date)