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April 4, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the First Antidumping Duty Administrative Review

## SUMMARY

We have analyzed the comments submitted in the first administrative review of certain kitchen appliance shelving and racks from the People's Republic of China ("PRC"). As a result of our analysis, we have made changes from the Preliminary Results.[1] We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum.

## BACKGROUND

The merchandise covered by the order is certain kitchen appliance shelving and racks as described in the "Scope of the Order" section of the Preliminary Results. The period of review ("POR") is March 5, 2009, through August 31, 2010.[2] In accordance with 19 CFR 351.309(c)(ii), the Department of Commerce ("Department") invited parties to comment on our Preliminary Results.

On January 6, 2012, Nashville Wire Products Inc. and SSW Holding Company, Inc. (collectively, "Petitioners"); New King Shan (Zhu Hai) Co., Ltd. ("NKS"); and Guangdong Wireking Housewares and Hardware Co., Ltd. ("Wireking") filed case briefs. On January 11, 2012, NKS and Wireking filed rebuttal briefs. On January 12, 2012, Petitioners filed a rebuttal brief. The Department did not hold a hearing because no interested party made such a request pursuant to 19 CFR 351.310(c).

[1] See Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Preliminary Results of the First Administrative Review, Preliminary Rescission, in Part, and Extension of Time Limits for the Final Results, 76 FR 62765 (October 11, 2011) ("Preliminary Results").

[2] As explained in the Preliminary Results, the abbreviated POR for oven racks, a subset of subject merchandise, is September 9, 2009, through August 31, 2010. See Preliminary Results, 76 FR at 62766.

## DISCUSSION OF THE ISSUES

### Comment 1: Zeroing

**Wireking**

- The Court of Appeals for the Federal Circuit ("CAFC") in Dongbu[3] rejected the Department's policy of zeroing negative margins in administrative reviews and not in investigations.
- In JTEKT,[4] the CAFC rejected the Department's justification of its zeroing methodology and remanded the issue back to the Department requiring an adequate explanation.
- The Department should elect not to zero negative margins.

**Petitioners**

- The Department has explained in response to Dongbu and JTEKT that it is reasonable for the Department to apply zeroing differently when the statute prescribes different methods for calculating margins in investigations and administrative reviews.

**Department's Position:**

We have not changed our calculation of the weighted-average dumping margin, as suggested by Wireking, in these final results.

Section 771(35)(A) of the Tariff Act of 1930, as amended ("the Act"), defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" (emphasis added). The definition of "dumping margin" calls for a comparison of normal value ("NV") and export price ("EP") or constructed export price ("CEP"). Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs (or CEPs) have been averaged together (i.e., averaging group).

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The definition of "weighted-average dumping margin" calls for two aggregations which are divided to obtain a percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

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[3] See Dongbu Steel Co., Ltd. v. United States, 635 F. 3d 1263 (CAFC 2011) ("Dongbu").

[4] See JTEKT Corp. v. United States, 642 F.3d 1378 (CAFC 2011) ("JTEKT").

The issue of "zeroing" versus "offsetting" involves how certain results of comparisons are treated in the aggregation of the numerator for the "weighted-average dumping margin" and relates back to the ambiguity in the word "exceeds" as used in the definition of "dumping margin" in section 771(35)(A) of the Act. Application of "zeroing" treats comparison results where NV is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in the aggregation of the numerator for the "weighted average dumping margin." Application of "offsetting" treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the "weighted-average dumping margin" to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department's interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

Whether "zeroing" or "offsetting" is applied, it is important to note that the weighted-average dumping margin will reflect the value of all export transactions, dumped and non-dumped, examined during the POR; the value of such sales is included in the aggregation of the denominator of the weighted-average dumping margin. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin under either methodology.

The difference between "zeroing" and "offsetting" reflects the ambiguity the CAFC has found in the word "exceeds" as used in section 771(35)(A) of the Act.[5] The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.[6] For decades the Department interpreted the statue to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the CAFC and other courts squarely addressed the reasonableness of

[5] See Timken Co. v. United States, 354 F.3d 1334, 1341-45 (CAFC 2004) ("Timken").

[6] See PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2003) ("PAM") ("{The} gap or ambiguity in the statute requires the application of the Chevron step-two analysis and compels this court to inquire whether Commerce's methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute."); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) ("Bowe Passat") ("The statute is silent on the question of zeroing negative margins."); Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce, 675 F. Supp. 1354, 1360 (CIT 1987) ("Serampore") ("A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter's home market as having a zero percent dumping margin.").

the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.[7] In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, i.e., to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law."[8] The CAFC explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value."[9] As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.[10]

In 2005, a panel of the World Trade Organization ("WTO") Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.[11] The initial WTO Dispute Settlement Body Panel Report was limited to the Department's use of zeroing in average-to-average comparisons in antidumping duty investigations.[12] The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act ("URAA") (19 U.S.C. § 3533(f), (g)) ("Section 123").[13] Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities' arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.[14]

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the CAFC recently

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[7] See, e.g., Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (CAFC 2008) ("Koyo 2008"); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (CAFC 2007) ("NSK"); Corus Staal BV v. United States, 502 F.3d 1370, 1375 (CAFC 2007) ("Corus II"); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (CAFC 2005) ("Corus I"); Timken, 354 F.3d at 1341-45; PAM, 265 F. Supp. 2d at 1370 ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); Bowe Passat, 926 F. Supp. at 1149-50; Serampore, 675 F. Supp. at 1360-61.

[8] See Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (March 17, 1986)); see also Timken, 354 F.3d at 1343; PAM, 265 F. Supp. 2d at 1371.

[9] See Timken, 354 F.3d at 1343.

[10] See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus II ,502 F.3d at 1370, 1375; and NSK, 510 F.3d at 1375.

[11] See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (October 31, 2005) ("EC-Zeroing Panel").

[12] See EC-Zeroing Panel.

[13] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006; and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (June 26, 2007) (collectively, "Final Modification for Investigations").

[14] See EC-Zeroing Panel at ¶¶ 7.284, 7.291.

held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.[15] Moreover, in Corus I, the CAFC acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations.[16] In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the CAFC found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations.[17] With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.[18]

The CAFC subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews.[19] In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the CAFC accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations.[20] The CAFC's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type.[21] The CAFC acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist.[22] The CAFC also expressly recognized that

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[15] See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F.3d 928, 934 (CAFC 2010).
[16] See Corus I, 395 F.3d at 1347.
[17] See Final Modification for Investigations.
[18] See id., at 77724. On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (February 14, 2012) ("Final Modification for Reviews"). The Final Modification for Reviews makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the Final Modification for Reviews does not apply here.
[19] See United States Steel Corp. v. United States, 621 F. 3d. 1351, 1355 n.2, 1362-63 (CAFC 2010) ("U.S. Steel").
[20] See id., at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping).
[21] See id., at 1361-63.
[22] See id., at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section 777A(d)(1)(B) of the Act.

the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing.[23] In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the CAFC acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that "{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do not exist."[24]

We disagree with Wireking that the CAFC's decisions in Dongbu and JTEKT require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in Dongbu and JTEKT did not overturn prior CAFC decisions affirming zeroing in administrative reviews, including SKF, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations.[25] Unlike the determinations examined in Dongbu and JTEKT, the Department, in these final results, provides additional explanation for its changed interpretation of the statute subsequent to the Final Modification for Investigations – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT, U.S. Steel, and SKF.

The Department's interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,[26] the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the URAA for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department's Final Modification for Investigations to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affirmed by the CAFC in

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[23] See U.S. Steel, 621 F.3d at 1363.
[24] See id. (emphasis added).
[25] See SKF v. United States, 630 F.3d 1365 (CAFC 2011) ("SKF").
[26] The Final Modification for Reviews adopts this comparison method with offsetting as the default method for administrative reviews, however, as explained at footnote 18, this modification is not applicable to these final results.

several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act.[27] In the Final Modification for Investigations, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the Charming Betsy doctrine, to comply with certain adverse WTO dispute settlement findings.[28] Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the Charming Betsy doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither Section 123 nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of the Department's legitimate policy choices in this case – i.e., to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review.[29] These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

Moreover, the Department's interpretation reasonably accounts for inherent differences between the results of distinct comparison methodologies. The Department interprets section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. This interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology the Department usually divides the export transactions into groups, by model and level of trade (i.e., averaging groups), and compares an average EP or CEP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product.[30] In calculating the average EP or CEP, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular

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[27] See, e.g., SKF USA, Inc. v. United States, 537 F.3d 1373, 1382 (CAFC 2008); NSK, 510 F.3d at 1379-1380; Corus II, 502 F.3d at 1372-1375; Timken, 354 F.3d at 1343.

[28] According to Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The principle emanating from the quoted passage, known as the Charming Betsy doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

[29] See Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (CAFC 1992).

[30] See, e.g., section 777A(d)(1)(A)(i) of the Act.

sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis "on average" for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department's average-to-average comparison methodology, which permits EPs above NV to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices.[31] Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – i.e., the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.[32] Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word "exceeds" in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the "aggregate dumping margin" within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets

[31] See, e.g., section 777A(d)(2) of the Act.

[32] As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

are: (1) implicitly granted when calculating average export prices; and (2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. We note that neither the U.S. Court of International Trade ("CIT") nor the CAFC has rejected the above reasons. In fact, the CIT recently sustained the Department's explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations.[33] Accordingly, the Department's interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the U.S. sales transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

**Comment 2: Surrogate Values**

**A. Surrogate Financial Ratios**

**Petitioners:**

- The Department should not have used the financial statement of Bansidhar Granites Private Limited ("Bansidhar") in the Preliminary Results.
- Mekins Agro Products Ltd. ("Mekins") produces wire products, including identical merchandise, whereas Bansidhar is a producer of fasteners.
- The Department prefers to use the financial statements of companies that produce identical merchandise even where that producer does not exclusively produce identical merchandise.[34]
- If the Department continues to use Bansidhar, it should also use the financial statement of Sterling Tools Limited ("Sterling"), which produces merchandise at least as comparable as those produced by Bansidhar, and was relied upon in the preceding segment.[35]
- There is no evidence that Mekins benefitted from countervailable subsidies.
- The Department held in PRC Persulfates that the mere existence of a subsidy is not sufficient evidence of distortion.[36]

[33] See Union Steel v. United States, Consol. Court No. 11-00083, Slip Op. 12-24 (CIT 2012).
[34] See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008), and accompanying Issues and Decision Memorandum at Comment 11.
[35] See Steel Wire Garment Hangers From the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the Second Antidumping Duty Administrative Review, 76 FR 66903, 66910-11 (October 28, 2011) ("PRC Hangers AR2 Prelim").

**Wireking:**

- The Department should disregard the financial statements of Mekins and Sterling that it used in the Preliminary Results because the companies may have benefitted from countervailable subsidies and Sterling produces non-comparable merchandise.
- The Department should consider the financial statements of Visakha Wire Rope Limited (2009-2010) ("Visakha"), Rajratan Global Wire Limited (2009-2010) ("Rajratan"), and Nasco Steels (2008-2009) ("Nasco") because they are all producers of comparable products with similar production processes as subject merchandise.[37]
- Mekins' financial statement contains evidence that it received packing credits and Sterling benefitted from the Export Promotion Capital Goods ("EPCG") scheme and the countervailable Advanced License System ("ALS") during the POR.
- There is no record evidence that the financial statements provided by Wireking (i.e., Bansidhar, Visakha, Rajratan and Nasco) benefitted from countervailable subsidies.
- Mekins' financial statement also indicates that it received a "State Subsidy," a research and development ("R&D") grant of the type typically countervailed by the Department, and a government sales tax deferment, a program that, based on the Department's website, has been found countervailable in each and every case reviewed by the Department.
- Even if some of the subsidies received by Mekins relate to prior PORs, the Department has found such a situation sufficient grounds to reject the use of a financial statement.[38]
- As the record contains at least one financial statement from a producer of comparable merchandise that did not receive subsidies, the Department should reject those that it has reason to suspect contain evidence of subsidies, i.e., Mekins and Sterling.
- If the Department does not reject Mekins on the basis of countervailable subsidies, it should reject it on the basis that it is not clear whether Mekins makes much of the materials pictured on its website, as was discovered in the PRC Wire Decking Investigation, and because it makes a highly diversified range of products that entail processing much more complex than is required for subject merchandise.

**NKS:**

- Mekins' financial statement clearly states that it received "packing credits," which have repeatedly been found by the Department to be countervailable, in significant amounts.
- The unexplained "state subsidy" noted in Mekins' financial statement may represent a countervailable subsidy.
- Mekins' financial statement does not contain breakdowns of operations, inputs and costs, preventing the proper allocation or exclusion of items and allowing for significant distortion of the ratios.
- Mekins' financial statement contains unexplained hand written figures which place the credibility of the entire submission at issue.

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[36] See Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 68 FR 68030 (December 5, 2003) ("PRC Persulfates"), and accompanying Issues and Decision Memorandum at Comment 3.

[37] See Wire Decking from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 32905 (June 10,2010) ("PRC Wire Decking Investigation"), and accompanying Issues and Decision Memorandum at Comment 2.

[38] See Jiaxing Brother Fastener Co., Ltd. v. United States, 751 F. Supp. 2d 1345, 1353 (CIT 2010).

**Department's Position:**

In the Preliminary Results, the Department determined that the financial statements of Mekins and Bansidhar were the best available information on the record to value factory overhead, selling, general, and administrative ("SG&A") expenses, and profit.[39] After the Preliminary Results, Wireking placed the statements of Vishaka, Rajratan and Nasco on the record, and Petitioners placed Sterling's financial statement on the record.

For these final results, we are calculating the surrogate financial ratios using the 2009-2010 audited financial statements of Mekins, Bansidhar and Sterling, because each of these financial statements is contemporaneous with the POR, complete and reliable, and these producers make a range of products (e.g., drawn and/or welded steel wire products, such as wire racks, nails, hinges, etc.) comparable to the subject merchandise.

The statute directs the Department to base the valuation of the factors of production on "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate. . . ."[40] The Department's criteria for choosing surrogate companies to calculate surrogate financial ratios are the availability of contemporaneous financial statements, comparability to the respondent's experience, and publicly available information.[41]

In evaluating financial statements for use in calculating the surrogate financial ratios, it is the Department's preference to match the surrogate companies' production experience with respondents' production experience, and whenever possible, surrogate country producers of identical merchandise provided that the surrogate value data is not distorted or otherwise unreliable.[42] Petitioners have argued that Mekins is the only producer of identical merchandise and therefore the Department should calculate financial ratios using only Mekins' financial statement. We have reviewed the evidence placed on the record by Petitioners, including the information from Mekins' website regarding samples of its products.[43] We find that, based on the record evidence, it appears that the wire shelving produced by Mekins does not fit the scope of the Order.[44] Specifically, the dimensions listed from the website indicate that the shelving products produced by Mekins are larger than the shelving and racks that are covered by the scope. However, because Mekins produces wire products, and the production process includes further processing such as welding, it is clear from the record that Mekins is a producer of comparable merchandise. Additionally, contrary to Wireking's argument that it is not clear from the record whether Mekins produced the products listed on its website, Mekins' financial statement shows that Mekins did produce shelving and other goods that are similar in processing to subject merchandise.[45] Therefore, we find that Mekins, in addition to Bansidhar and Sterling,

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[39] See Preliminary Results, 76 FR at 62774.
[40] See section 773(c)(1) of the Act.
[41] See Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 36656 (July 24, 2009) ("LTFV Investigation"), and accompanying Issues and Decision Memorandum at Comment 10.
[42] See, e.g., PRC Persulfates and accompanying Issues and Decision Memorandum at Comment 1.
[43] See Petitioners' August 1, 2011, Surrogate Value Submission at Exhibits C-4 and C-5.
[44] See Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Notice of Antidumping Duty Order, 74 FR 46971 (September 14, 2009) ("Order").
[45] See id., at Exhibit C-6.

had production of comparable merchandise for purposes of determining financial ratios for Wireking and NKS.

Turning to the respondents' comments, 19 CFR 351.408(c)(4) stipulates that the Department normally will value manufacturing overhead, SG&A expenses and profit using "non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country." In complying with the statute and the regulations, the Department calculates the financial ratios based on contemporaneous financial statements of companies producing comparable merchandise from the surrogate country. However, where the Department has a reason to believe or suspect that the company producing comparable merchandise may have received subsidies which the Department has found to be countervailable, it may consider that the financial ratios derived from that company's financial statements are less representative of the financial experience of the relevant industry than the ratios derived from financial statements that do not contain evidence of subsidization.[46] Consequently, the Department does not rely on financial statements where there is evidence that the company received countervailable subsidies when there are other sufficiently reliable and representative data on the record for purposes of calculating the surrogate financial ratios.[47]

Wireking has argued that Sterling benefitted from the EPCG scheme and the ALS during the POR. First, with respect to the EPCG scheme, we note that Wireking submitted a business report and meeting notes from India's EPCG committee in an attempt to demonstrate that Sterling received countervailable subsidies.[48] Neither of these submissions demonstrates that Sterling received any benefits at any time, before or during POR, only that it applied for benefits. Additionally, with respect to the ALS system, Wireking has only demonstrated that Sterling was granted a license, not that it ever received any benefits under this program.[49] Further, there is no evidence in Sterling's financial statement to support the assertion that Sterling received any subsidies during or prior to the POR. Thus, we find that the evidence on the record does not indicate that the company received countervailable subsidies during the POR, from a program previously investigated by the Department.[50]

Additionally, Wireking has argued that Mekins received "packing credits" during the POR, which the Department has previously found to be countervailable. Additionally, Wireking states that Mekins financial statement lists a "state subsidy" and an R&D grant which are likely actionable. In our examination of Mekins statement, we found that it did receive packing credits, a state subsidy, and an R&D grant, that were applicable during the POR. However, there is no evidence that any of these line items are related to a specific program that has been found to be

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[46] See Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 576, 100th Cong., 2nd Sess., at 590-91 (1988) at 590 (directing the Department to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices").

[47] See Certain Frozen Warmwater Shrimp From the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 52049 (September 12, 2007) , and accompanying Issues and Decision Memorandum at Comment 2 (where the Department determined that the financial statements of several companies that had received countervailable subsidies did not constitute the best available information to value the surrogate financial ratios and, consequently, did not use them).

[48] See Wireking's November 17, 2011, Rebuttal Surrogate Value Comments at Exhibits 1 and 2.

[49] See id.

[50] See Polyethylene Terephthalate Film, Sheet and Strip from India: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review, 76 FR 14493 (March 12, 2012) and accompanying Issues and Decision Memorandum at Comment 2.

countervailable by the Department. For example, the packing credits found to be countervailable by the Department in India PET Film are packing credit received under a specific program (Pre- and Post-Shipment Export Financing).[51] As there is no evidence that the packing credits or other alleged subsidies received by Mekins were provided under programs found by the Department to be countervailable, we find that this scenario is analogous to that addressed in Fish from Vietnam where we found that there was insufficient information to warrant disregarding the financial statement in question.[52]

During the course of this review, parties placed six publicly available financial statements on the administrative record. After examining the financial statements submitted by all parties, and taking into account the Department's criteria for considering whether to use financial statements for calculating surrogate financial ratios, we concluded that we have three useable financial statements (of Mekins, Bansidhar and Sterling) and determined that the remaining three financial statements were not suitable for use in deriving the surrogate financial ratios for purposes of these final results, as discussed below.

For the final results, we concluded that the 2008-2009 financial statement of Nasco is not suitable for use in deriving the surrogate financial ratios because its statement is not contemporaneous with the POR.[53] We have found that there are additional contemporaneous surrogate financial statements on the record that we deemed to constitute the best available information, for the reasons discussed above. Accordingly, we did not use non-contemporaneous data.

Although the 2009-2010 Indian financial statements of Vishaka and Rajratan are contemporaneous with the POR, we have determined that these statements are not suitable for use in deriving the surrogate financial ratios because each company's financial statement indicates that it is not a producer of identical or comparable merchandise. While Wireking argues that the Vishaka and Rajratan are producers of comparable merchandise, we disagree. During the underlying LTFV Investigation, the Department specifically stated that wire and wire rope producers do not accurately reflect the more complex production experience of producers of subject merchandise.[54] As both Vishaka and Rajratan are producers of wire rope products, we do not find them to be producers of comparable merchandise for these final results.[55]

As noted above, the Department's criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the respondent's experience, and publicly available information.[56] For the final results, we have three sets of financial statements from Indian producers of comparable merchandise, which are contemporaneous with the POR, that do not contain evidence that they received subsidies previously found by the Department to

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[51] See Polyethylene Terephthalate Film, Sheet, and Strip From India: Preliminary Results and Rescission, in Part, of Countervailing Duty Administrative Review, 72 FR 43607 (August 6, 2007) and accompanying Issues and Decision Memorandum at Comment 2 ("India PET Film").

[52] See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review, 72 FR 13242 (March 21, 2007) ("Fish from Vietnam"), and accompanying Issues and Decision Memorandum at Comment 9.

[53] See Wireking's November 7, 2011, Surrogate Value Comments at Exhibit 9.

[54] See LTFV Investigation and accompanying Issues and Decision Memorandum at Comment 10.

[55] See Wireking's November 7, 2011, Surrogate Value Comments at Exhibits 7 and 8.

[56] See LTFV Investigation and accompanying Issues and Decision Memorandum at Comment 10.

be countervailable, and that are publicly available, which satisfy the Department's criteria for selecting surrogate companies.

We have selected for these final results the financial statements of Mekins, Bansidhar and Sterling. Further, we have determined not to use the 2008-2009 financial statements of Nasco for the final results, because they are not contemporaneous with the POR, and we have determined not to use the financial statements of Vishaka and Rajratan because they are not producers of comparable merchandise. Therefore, in order to calculate the surrogate financial ratios for manufacturing overhead, SG&A expenses, and profit, the Department has used the average of the audited financial statements of Mekins, Bansidhar and Sterling.

**B. Brokerage and Handling**

**Wireking's Case Brief**

- There is no evidence on the record that Wireking procured an export letter of credit to finance its export trade, therefore, the cost of obtaining an export letter of credit should be deducted from the surrogate value from the World Bank report Doing Business in India: 2010.

**Petitioners' Rebuttal Brief**

- In a non-market economy case, brokerage and handling encompasses a credit financing element, which includes any and all export servicing fees, costs and expenses. Therefore, all of the export charges included in Doing Business in India apply to Wireking's export sales to the United States.

**Department's Position:**

The Department disagrees with Wireking that the cost of obtaining an export letter of credit should be deducted from the calculated surrogate value for brokerage and handling. First, while Wireking has stated in its case brief that there is no evidence that it procured an export letter of credit, it did not place any evidence on the record regarding whether it obtained a letter of credit, and never affirmatively stated that it did not procure an export letter of credit. The Statement of Administrative Action ("SAA") clearly places the burden on the respondent to demonstrate the appropriateness of any adjustment that benefits the respondent.[57] In this case, Wireking claims that the Department should adjust the brokerage and handling surrogate value, however, it has not provided any evidence that it is entitled to the adjustment.

**Comment 3: Issues Regarding NKS**

**A. Conversion of Gross Unit Price**

**NKS' Comments:**

- The Department incorrectly converted Gross Unit Price ("GRSUPRU") from units to kilograms ("kg") in its SAS programming language.

[57] See SAA, URAA, H.R. Doc. No. 103-316, vol. 1, at 829 (1994); see also 19 CFR 351.401(b)(1) ("The interested party that is in possession of relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment."); Fujitsu Gen. v. United States, 88 F.3d 1034, 1046 (CAFC 1996) (explaining that a party seeking an adjustment bears the burden of proving the entitlement to the adjustment).

- The error results in a double conversion of GRSUPRU and should be corrected by properly terminating the "IF/THEN" statement.

**No other parties commented on this issue.**

**Department's Position**

The Department agrees with NKS that the Department incorrectly applied a conversion calculation in its SAS programming language. In the Preliminary Results, we stated that we converted the Gross Unit Price and other expenses reported by NKS from a per piece basis to a per kg basis to align its U.S. sales variables with its reported FOP ratios.[58] However, the Department inadvertently phrased an "IF/THEN" statement in its SAS programming language so that the program improperly carried out multiple conversions on each variable, rather than a single intended conversion from pieces to kg. Therefore, we are correcting the programming language to include the proper command structure of "IF/THEN/DO/END" to ensure that each command string is only carried out once for the intended observations.

**B. Inclusion of Affiliate's Name in Cash Deposit and Liquidation Instructions**

**NKS' Comments:**

- The Department should revise its liquidation instructions to include NKS's non-PRC affiliate.
- The participation of this affiliate was an integral part of every sale made by NKS to the United States.
- Because NKS's non-PRC affiliate's name does not readily translate into Chinese, it uses two different names for business purposes.
- NKS's non-PRC affiliate sends a pro forma invoice to the U.S. customer for Customs entry and the U.S. importer may have used NKS's non-PRC affiliates' name or listed it as the producer for entry purposes.
- Liquidation instructions should reflect the cash deposit rate at which NKS's non-PRC affiliate exported goods produced by NKS.
- Accordingly, the Department should revise its cash deposit instructions to ensure that NKS's exports from the PRC are not erroneously subject to the wrong final rate by either including the additional names of NKS's non-PRC affiliates as exporters or stating that these are alternate names under which NKS trades.

**No other parties commented on this issue.**

**Department's Position**

We agree with NKS that the facts of the record indicate that NKS and its non-PRC affiliate should be treated as a single entity in this proceeding and the liquidation and cash deposit instructions should reflect that determination. In the Preliminary Results, we stated that "while

[58] See Memorandum to the File from Kabir Archuletta, Case Analyst, Office 9, through Catherine Bertrand, Program Manager, Office 9, regarding Analysis Memorandum for the Preliminary Results of the First Antidumping Duty Administrative Review of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: New King Shan (Zhu Hai) Co., Ltd., dated September 30, 2011, at 9-10.

we find NKS and its related entities affiliated, we are not finding that the facts warrant treatment as a single entity."[59] We have reexamined our preliminary determination based on the record of NKS's questionnaire responses and revisited our previous affiliation determinations made with respect to NKS.

In the Preliminary Results, the Department found NKS affiliated with certain related entities, pursuant to sections 771(33)(A), (E) and (F) of the Act, based on ownership and common control, in accordance with our determination in the LTFV Investigation.[60] For these final results, based on the evidence presented in NKS's questionnaire responses, we find that NKS and one of its affiliated entities should be treated as a single entity for the purposes of this administrative review. This finding is based on our determination that NKS and its affiliated entity are involved in the export of subject merchandise sold by NKS and that a significant potential for manipulation of price or production exists between these entities. While NKS's affiliated entity is not a producer of subject merchandise, where companies are affiliated and there exists a significant potential for manipulation of prices and/or export decisions, the Department has found it appropriate to treat those companies as a single entity.[61] In this case, not only is NKS's affiliated entity an exporter of subject merchandise, but it is an intermediary for all transactions of subject merchandise between NKS and its unaffiliated U.S. customer(s). Accordingly, we find that the liquidation and cash deposit instructions issued at the conclusion of this proceeding should reflect the names of NKS and its affiliated entity.[62]

## RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation program accordingly. If accepted, we will publish the final results of review and the final dumping margins in the Federal Register.

AGREE_____ DISAGREE_____

_____
Paul Piquado
Assistant Secretary
for Import Administration

_____
Date

[59] See Preliminary Results, 76 FR at 62767.
[60] See Memorandum to the File from Kabir Archuletta, Case Analyst, Office 9, through Catherine Bertrand, Program Manager, Office 9, regarding "First Administrative Review of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Affiliations of New King Shan (Zhu Hai) Co., Ltd.," dated September 30, 2011.
[61] See Hontex Enterprises, Inc. v. United States, 248 F. Supp. 2d 1323, 1343 (CIT 2003).
[62] Due to the proprietary nature of this issue, see the Memorandum to the File from Kabir Archuletta, Case Analyst, Office 9, through Catherine Bertrand, Program Manager, Office 9, regarding First Administrative Review of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Affiliations of New King Shan (Zhu Hai) Co., Ltd. for the Final Results, dated concurrently with this memorandum.