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MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the 2009-2010 Administrative Review of the Antidumping Duty Order on Certain Circular Welded Carbon Steel Pipes and Tubes from Taiwan

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2009-2010 administrative review of the antidumping duty order on certain circular welded carbon steel pipes and tubes from Taiwan. As a result of our analysis and as discussed below, we have made no changes to the margin assigned to the respondent. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comment from parties:

Comment 1: Date of Sale for U.S. Sales
Comment 2: Zeroing

Background

On June 8, 2011, the Department published the preliminary results of this review for the period May 1, 2009, to April 30, 2010. See Preliminary Results of Antidumping Duty Administrative Review: Circular Welded Carbon Steel Pipes and Tubes From Taiwan, 76 FR 33210 (June 8, 2011) (Preliminary Results). In response to the Department's invitation to comment on the Preliminary Results, respondent Yieh Phui Enterprise Co., Ltd. (Yieh Phui) filed its case brief on July 15, 2011. Domestic interested party U.S. Steel Corporation (U.S. Steel) submitted a rebuttal brief on July 22, 2011. Domestic interested parties Allied Tube & Conduit Corporation and TMK Ipsco (Allied/Ipsco) filed a joint rebuttal brief on July 22, 2011.

Discussion of the Issues

Comment 1: Date of Sale for U.S. Sales

Yieh Phui notes that the Department used invoice date as the date of sale for U.S. sales, and argues that the Department should instead use contract date as the date of sale for U.S. sales because substantial record evidence demonstrates that the contract date better reflects the date on which Yieh Phui established the material terms of sale.

Yieh Phui acknowledges that invoice date is the presumptive date of sale, but notes the Department has the discretion to select another date as date of sale if that alternative date better reflects the date on which the material terms of sale are set. Yieh Phui notes that the preamble to the Department's regulations refers to exceptions to using the invoice date as the presumptive date of sale, highlighting the example of "situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures," for which "the Department usually will use a date other than the date of invoice" for date of sale. See Antidumping Duties; Countervailing Duties: Final Rule, 62 FR 27296, 27349 (May 19, 1997) (Preamble). Yieh Phui notes the Court of International Trade (CIT) has held that the presumption of using the invoice date is merely a rebuttable assumption and "one that has been successfully rebutted in numerous cases in the past." See Nucor Corp. v. United States, 612 F. Supp. 2d 1264, 1304 (CIT 2009) (Nucor).

Yieh Phui states the Department has found contract date to be the proper date of sale in numerous cases when it better reflected the date on which the material terms were established by the parties, and cites the following examples: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 63 FR 32833, 32833-32836 (June 16, 1998) (Korean Pipe); Certain Welded Carbon Steel Pipes and Tubes from Thailand; Final Results of Antidumping Duty Administrative Review, 65 FR 65910 (October 13, 2000), and accompanying Issues and Decision Memorandum at Comment 1 (Thai Pipe); Notice of Final Determination of Sales at Less Than Fair Value; Sulfanilic Acid from Portugal, 67 FR 67219 (September 25, 2002), and accompanying Issues and Decision Memorandum at Comment 1 (Sulfanilic Acid); and Final Results of Redetermination Pursuant to Court Remand in Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States, Slip Op. 07-167 (November 15, 2007), September 8, 2009, at 45 (Habas Remand).

Yieh Phui notes that in Nucor, the CIT found that the Department must "undertake a factual analysis of the expectations and conduct of the contracting parties, to ascertain when they reached a true meeting of the minds on the material terms of sale." Nucor at 1309. Yieh Phui also notes that ruling indicated "that the material terms of sale can change up to the time of invoice is not dispositive." See id. at 1312.[1] Yieh Phui argues that the Department's data

[1] A more extensive citation reads:

> Under both settled law and agency practice, that analysis does not, and should not, hinge on a single change in price or quantity, or the volume of sales affected by that change, with no regard for any other relevant facts. See Pipe from Mexico, 2000 WL 777746, at Hylsa comment 1 (noting, in principle, that the fact "that

analysis in its preliminary results was incorrectly based solely on post-final contract changes to the material terms of sale and failed to consider record evidence conceming markedly different sales processes between Yieh Phui's U.S. and domestic sales. As a result, Yieh Phui claims, the Department disregarded substantial evidence which demonstrates that the contract date better reflects the date on which Yieh Phui and its U.S. customers had a true "meeting of minds." Furthermore, Yieh Phui claims that the Department's finding that there were multiple changes to the material terms of sale after the final contract date is not supported by the record evidence.

With respect to the number of changes to material terms of sale, Yieh Phui. states the record evidence shows that only 1out of 62 U.S. sales contracts involved a post-final contract change to the price or quantity term. The Department, Yieh Phui asserts, cannot reject contract date as date of sale based on a single change to material terms because over the course of a full year that is an extraordinarily low percentage of frequency of change, citing Nucor at 1310.

With respect to the changes to delivery terms for 30 out of 932 sales observations (involving 7 out of 62 contracts, and a total of 5 customers), Yieh Phui indicates that whether partial shipments are allowed is not a material term of sale with respect to date of sale analysis. Yieh Phui states that in choosing the date of sale, the Department should "weigh{} the evidence presented and regularly determine{} the significance of any changes to the terms of sale involved." See Nakomthai Strip Mill Public Company Limited v. United States, 558 F.Supp. 2d 1319,1327-1328 (CIT 2008) (Nakomthai 2008). Yieh Phui states the Department failed to make a factual finding demonstrating that changes to Yieh Phui's "partial shipment" term are of any significance to the material terms of sale to which Yieh Phui and its U.S. customers agreed.

Yieh Phui argues that the Department failed to cite any precedent in support of its finding that all sales terms associated with the delivery of goods are considered to be "material" terms of sale, other than Sahaviriya Steel Industries Public Company Limited v. United States, 714 F. Supp. 2d 1263 (CIT 2010) (Sahaviriya). Sahaviriya cites precedents that Yieh Phui argues are not apposite. The CIT noted in Sahaviriya that "the Department's practice has evolved to include price, quantity, delivery terms and payment terms" when considering what types of changes affect the determination of sale date. See Sahaviriya at 1280, quoting SeAH Steel Corp. v. United States, 25 CIT 133,134 (CIT 2001) (SeAH); Nakomthai Strip Mill Public Co. v. United States, 614 F.Supp.2d 1323, 1334 (CIT 2009) (Nakornthai 2009). Yieh Phui states, however, that SeAH does not refer to delivery terms. With respect to Nakomthai 2009, Yieh Phui states the CIT affirmed the Department's finding that a change to the shipment date was material because that change affected the maximum credit expenses originally expected by the contracting parties. See Nakomthai 2009 at 1334.

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the material terms of sale can change up to the time of invoice is not dispositive"). Even when there is evidence of change in a material term, Commerce still must consider whether -- as evidenced by their understanding of the sales process, as well as their course of conduct -- the parties had the expectation that the material terms of sale were fixed on the date of contract.

See Nucor at 1312.

In this review, according to Yieh Phui, the changes to the "partial shipment" term did not affect the shipment date term agreed upon by Yieh Phui and its U.S. customers, and thus did not affect the maximum credit expenses originally expected by Yieh Phui and its U.S. customers in negotiating the contract. Yieh Phui states that "PARTIAL SHIPMENT" (a term indicating whether partial shipments are allowed) is one of the six separate terms associated with the delivery of goods identified in Yieh Phui's standard sales contract, the others being:

- TERMS OF SALE(TERMS.PORT)"
- DESTINATION
- VESSEL(BULKICONTAINER)
- SHIPMENT, and
- TRANSHIPMENT.

Yieh Phui argues the Department erred in determining PARTIAL SHIPMENT is a material term of sale because, unlike several other delivery terms (TERMS OF SALE(TERMS.PORT), DESTINATION, and VESSEL(BULKICONTAINER)), the PARTIAL SHIPMENT term does not affect costs or other expenses. Also,Yieh Phui argues that, unlike the SHIPMENT term, the PARTIAL SHIPMENT term does not otherwise affect Yieh Phui's performance of its overall contractual duty to deliver goods on time because Yieh Phui still had to meet the agreed-upon shipment date required under the "SHIPMENT" term regardless of whether it ultimately transported the merchandise in one shipment or in multiple shipments.

Finally, with respect to the PARTIAL SHIPMENT term, Yieh Phui states pre-contract correspondence between Yieh Phui and its U.S. customers shows that partial shipments could be allowed as long as there was a prior approval from the customer. See Yieh Phui's November 9, 2010 Section B-C response at Exhibit 7; see also Yieh Phui's April 20, 2011 submission at 4-5.

Yieh Phui also argues that substantial evidence shows the contract date better reflects the date on which the parties had a true "meeting of the minds" for Yieh Phui's US. sales. Yieh Phui notes the sales process of U.S. sales is markedly different from that of home market sales, citing Korea Pipe as precedent for considering this when determining date of sale. Yieh Phui identified three types of contrasts between the U.S. and home market sales processes that it claims provide the basis for identifying different sales date in the home market (invoice date) and US. market (contract date): 1) use of formal negotiation and contracting procedures for US. sales, but informal procedures for home market sales; 2) long lead time required to produce made-to-order merchandise for u.S. sales, as opposed to inventory sales for home market sales; and 3) Yieh Phui and its customers behaving as contractually bound parties with respect to written contracts for U.S. sales, while no written contracts were used for home market sales. Yieh Phui indicates these criteria of Yieh Phui's US. sales are identified in Nucor as the basis for using contract date as date of sale rather than invoice date.

With respect to formal negotiation and contracting procedures, Yieh Phui contrasts those used for US. sales versus those used for home market sales, and states the CIT has held that "the use of formal negotiation and contracting procedures is conduct that bears directly on the expectations of the parties to a sale." See Nucor at 1315. Yieh Phui states its home market sales were informally negotiated, normally by telephone, and while internal order confirmations were generated by Yieh Phui for its internal reference, those confirmations were not communicated to customers and no written agreements were executed. See Yieh Phui's July 29,2010 Section A response at 16, and Yieh Phui's September 29,2010 supplemental questionnaire response at 31-35. Yieh Phui states that because its home market sales were made from inventory, resulting in sales terms that were readily subject to change prior to shipment, the home market sales terms were normally finalized upon Yieh Phui's issuance of the invoice upon shipment. See Yieh Phui's July 29, 2010 Section A response at16, and Yieh Phui's September 29, 2010 supplemental questionnaire response at 31-35.

In contrast, for U.S. sales, Yieh Phui first received written price inquiries from the customer and, after negotiating sales terms by telephone and/or e-mail and reaching an agreement, Yieh Phui generated and signed a formal sales contract which it sent to the customer for counter-signature. See Yieh Phui's September 29,2010 supplemental questionnaire response at 29-30. Yieh Phui states these standard format documents memorialized the parties' mutual understanding of all essential terms of the contract, including, for example, sales prices and quantities, delivery terms, and payment terms. See Yieh Phui's July 29,2010 Section A response at Exhibit 10. Yieh Phui states that only in rare instances was the original contract amended in accordance with mutually agreed-upon, revised sales terms, noting the Department correctly found in its preliminary results that sales contracts were amended in only 2 of 62 instances after the initial contract was concluded. Yieh Phui states that when the original contract was amended, a new contract was always executed to reflect the changes, with only one exception, citing the Department's reference to the one instance of a change in quantity after the reported final contract date.

With respect to what Yieh Phui characterizes as the long lead time required to produce made-to-order merchandise, Yieh Phui states that the CIT has acknowledged that "when merchandise must be made-to-order, a seller is generally unwilling to incur costs and begin production unless and until the material terms of sale have been established." See Nucor at 1317. Yieh Phui states there was virtually no lead time for home market sales. See Yieh Phui's September 29,2010 supplemental questionnaire response at 35. In contrast, Yieh Phui states that the large quantities and particular specifications involved in U.S. sales led Yieh Phui and its U.S. customers to expect that a certain amount of lead time was required. Yieh Phui states that its sample sales show the lead time expected ranged from one to three months and that for the reported U.S. sales the weighted-average lag time between the contract date and the invoice date was 82 days. As a result, Yieh Phui argues, Yieh Phui and its U.S. customers expected that entering into a formal, legally binding sales contract would provide certainty and protection for the seller to sell the goods in conformity with the specifications ordered and also for the buyer to pay the agreed-upon selling price.

With respect to the course of conduct of the contracting parties, Yieh Phui states its behavior with respect to the U.S. sales process was "not the behavior of a producer that believes it is free to change or breach its contracts." See Nucor at 1321. Yieh Phui indicates it understood it was contractually bound to perform in accordance with the written contracts, which included producing the merchandise per the specifications in the contract and arranging and paying for various freight services associated with shipping the merchandise from its factory in Taiwan to the U.S. port. Yieh Phui insists the expenses reported in Yieh Phui's U.S. sales database reflect the performance of, and payment for, these services. See Yieh Phui's July 29, 2010 Section A response at 16 and Yieh Phui's January 7, 2001 supplemental questionnaire response at Exhibit 30. Yieh Phui indicates that its U.S. customers honored their contractual duties as established in the contracts, noting the U.S customers paid for the merchandise prior to·shipment, in accordance with the standard payment terms that Yieh Phui used in its U.S. sales contracts. See Yieh Phui's November 9,2010 Section B-C response at 50-51.

Allied/Ipsco states the Department reasonably found in its preliminary results that because of changes in material terms of sale after contract date, the date of invoice best represents the date of sale for Yieh Phui's U.S. sales. Allied/Ipsco states differences in the process of negotiating sales in the United States and in Taiwan do not detract from the Department's finding that the date of sale in both markets is the date of invoice. Allied/Ipsco conclude that the Department should continue to apply the invoice date as the date of sale for the final results.

U.S. Steel argues that the invoice date is the presumptive date of sale, and that a party proposing a different date of sale must show the proposed date better reflects the date on which the material terms of sale are established. See 19 CFR 351.401(i) and Allied Tube & Conduit Corp. v. United States, 127 F.Supp.2d 207, 219 (CIT 2000) (Allied Tube I), respectively. U.S. Steel states the CIT has indicated that to make such a showing, the party must establish that "the material terms of sale undergo no meaningful change (and are not subject to meaningful change) between the proposed date and the invoice date." See Allied Tube & Conduit Corp. v. United States, 132 F.Supp.2d 1087, 1090 (CIT 2001) (Allied Tube II). U.S. Steel states that Allied Tube **II** supports the use of invoice date as date of sale for even a single change in quantity after the contract. See Allied Tube **II** at 1092. U.S. Steel argues that the Department noted changes to material terms for multiple sales for multiple customers, and that Yieh Phui's challenges to the Department's preliminary finding that the invoice is the appropriate date of sale for Yieh Phui's U.S. sales are devoid of merit.

U.S. Steel states sample sales documentation shows the delivery terms in the final contracts changed with respect to whether partial shipments were allowed. U.S. Steel asserts the Department correctly noted in its preliminary results that delivery terms changed after the date of the final contract for 30 U.S. sales, involving multiple contracts and multiple customers. U.S. Steel states Yieh Phui's claim that changes to the PARTIAL SHIPMENT delivery term (e.g., delivering the ordered merchandise via multiple shipments in instances where the contract indicated that was not allowed) did not affect Yieh Phui's performance of its overall contractual duty to deliver the goods on time is baseless, based on analysis of transaction-specific sales documentation indicating that shipments were made outside of the shipment date terms identified in the contract.

Furthermore, U.S. Steel states that the delivery of goods via multiple shipments, contrary to Yieh Phui's claim, does affect the credit expenses incurred by Yieh Phui, because the use of multiple shipments results in differing shipment dates and payment dates. U.S. Steel supports this by citing variations in reported credit expenses for shipments associated with the same contract that resulted in part from the differences in credit periods. These variations, U.S. Steel avers, resulted from shipments and payments being made on different days. U.S. Steel states the CIT's ruling in Nakornthai 2009 that a change in date of shipment affects the credit expense calculation and thereby supports finding Yieh Phui's PARTIAL SHIPMENT delivery term to be a material term of sale. See Nakornthai 2009 at 1323.

With respect to Yieh Phui's claim that Yieh Phui and its U.S. customers intended to keep the PARTIAL SHIPMENT delivery term "flexible" and that this supports use of contractdate as date of sale, U.S. Steel argues that a "flexible" delivery term demonstrates the contract date was not the date on which material terms were "fixed" and firmly established, citing Issues and Decision Memorandum in Stainless Steel Butt-Weld Pipe Fittings From Korea; Notice of Final Results of Antidumping Duty Administrative, 68 FR 69995 (December 16, 2003) at Comment 4. U.S. Steel notes that to the extent the U.S. customers actually approved partial shipments after the date of the final contract (which in examples cited was not allowed under the final contract), such approval would itself constitute a change to the term that partial shipments are not allowed. U.S. Steel notes such changes to delivery terms, along with changes to quantity for one contract after the reported final contract date, were cited by the Department in its preliminary results as reasons for using invoice date as date of sale. U.S. Steel states the Department's preliminary finding conforms with the CIT's ruling in Allied II. See Allied II at 1092.

Regarding Yieh Phui's claims regarding formal negotiation and contracting procedures, long lead times required to produce merchandise, and the contracting parties' other course of conduct, U.S. Steel claims Yieh Phui raised the same argument in the prior administrative review, and the Department rejected it. See Issues and Decision Memorandum in Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review, 75 FR 62366 (October 8, 2010) (Taiwan Pipe), at Comment 1. U.S. Steel states Yieh Phui has not offered any reason to distinguish the facts in the instant review from those in the prior review.

Regarding the formal negotiation and contracting process for Yieh Phui's U.S. sales, U.S. Steel states the Department found in the prior review that although Yieh Phui did undergo a contracting process for U.S. sales, it "did not always issue revised contracts when terms of sale changed" and "the existence of formal order confirmations and written contracts did not prevent subsequent changes to material terms of sale." See Taiwan Pipe at Comment 1. U.S. Steel states Yieh Phui did not issue revised contracts when delivery terms or quantity terms changed for the current review, either. In fact, as noted, Yieh Phui acknowledged it wished to keep the delivery terms in its contracts "flexible."

Regarding Yieh Phui's reference to a lag time of one to three months between contract date and invoice date for U.S. sales, and its claim that this shows Yieh Phui and its U.S. customers expected the material terms of sale to be established as of the date of contract, U.S. Steel notes the CIT has recognized that the "mere existence" of lag time, by itself, is not persuasive for date-of-sale purposes, but, rather, is significant in determining the appropriate date of sale only where a party demonstrates that "it caused one of the parties to explicitly fix the terms of the contract." The CIT noted that in another case, the Department had found lag time to be significant because it was accompanied by language in an order acknowlegment specifying "that there can thereafter be no further changes in the tenns of sale" as well as affidavits from U.S. customers declaring that "the order acknowlegments are understood as the parties' final agreement." See Nakornthai 2008 at 1307-1308. In contrast, U.S. Steel notes, Yieh Phuihas failed to provide any evidence that the existence of lag time caused it to take measures to explicitly fix the tenns of the contract. With respect to lag time referenced in Korean Pipe, U.S. Steel notes in that case the Department noted there was a lag "reaching upwards of six months" and "{t}he material tenns of sale in the U.S. are set on the contract date and any subsequent changes are usually immaterial in nature or, ifmaterial, rarely occur." See Korean Pipe at 32836. In contrast, U.S. Steel notes, the expected lag time was only one to three months and there were numerous changes to the material tenns of sale following the date of the final contract. U.S. Steel also notes the Department has found lag time to be irrelevant where the evidence shows that the material tenns of sale are subject to change. See Issues and Decision Memorandum in Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 74 FR 45611 (September 3, 2009) at Comment 3; see also Taiwan Pipe at Comment 1.

Regarding course of conduct of the contracting parties after the date of final contract, such as Yieh Phui producing the merchandise and arranging for international shipment, U.S. Steel states the Department rejected the same argument in the prior review because the material tenns of sale continued to change after the reported final contract date. See Taiwan Pipe at Comment 1.

U.S. Steel concludes that the date of final contract does not reflect the date on which the material tenns of sale for Yieh Phui's U.S. sales are set because the material tenns of sale were subject to change and did, in fact, change between the date of Yieh Phui's final contract and the date of invoice.

Department's Position:

The Department's regulations state that "the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." See 19 CFR 351.401(i). The regulation also states that, "in identifying the date of sale of the merchandise under consideration or foreign like product, the Secretary nonnally will use the date of invoice, as recorded in the exporter or producer's records kept in the normal course of business." Id. A recent decision in the prior administrative review of this order involved the same respondent (Yieh Phui) and evidence of changes in the material tenns of sale after the reported contract dates; the CIT upheld the Department's choice of invoice date as the date of sale for U.S. sales. See Yieh Phui Enterprise Co. v. United States, Slip Op. 11-107 (August 24,2011). The CIT has noted that a "party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to 'satisfy' the Department that 'a different date better reflects the date on which the exporter or producer establishes the material tenns of sale.'" Allied Tube I at 1090 (CIT 2001) (quoting 19 CFR 351.401(i)).

In Sahaviriya, the CIT noted that in detennining which date better reflects the date on which the material tenns of sale are set, the Department's practice has evolved to include analysis of various material terms of sale, including price and quantity. See Sahaviriya at 1280. In

Sahaviriya, the CIT noted the Department has interpreted material terms of sale to include the specification of an aggregate quantity tolerance level because the aggregate quantity tolerance level may be viewed as specifying the amount or quantity of the merchandise to be shipped. Id., citing Nakomthai 2008. **In** other words, if shipped and invoiced quantities collectively vary from the overall quantity in the underlying contract by more than is allowed by the quantity tolerance in the underlying contract, then the quantity is considered to have changed in a material way from that in the contract.

For the 62 U.S. sale contracts, there were two changes in quantity outside of the quantity tolerance allowed by the contract. For one of those two, Yieh Phui issued a revised contract; for the other, it did not. These are both instances in which a material term of sale changed after the establishment of the contract between Yieh Phui and its **U.S.** customer. The fact that a revised contract was issued for one of these instances does not detract from the conclusion that material terms of sale were subject to change after contract.

The Court in Sahaviriya noted that the Department considers delivery terms and payment terms, as well as price and quantity, when evaluating when material terms of sale were set for purposes of determining the date of sale. See Sahaviriya at 1280. Sahaviriyacites prior rulings in support of the conclusion that the Department's date of sale practice has "evolved" such that it "now considers, among other contractual terms, delivery and payment terms as material terms of sale." Specifically, in Nakomthai 2009 the CIT noted this was a "reasonable interpretation of {the Department's} regulatory practice," and that this interpretation is supported by various decisions. As a result, the CIT found the Department's legal conclusion that payment and delivery terms are material to be in accordance with law. See Nakornthai 2009 at 1333-1334. While changes in delivery terms and payment terms are not always a factor in the date of sale analysis, the Department has stated it is its normal practice to consider changes in delivery terms and payment terms. See, e.g., Wire Decking from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 32905 (June 10,2010), and accompanying Issues and Decision Memorandum at Comment 10; and Certain Steel Threaded Rod from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 73 FR 58931, 58939 (October 8, 2008), unchanged at Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 8907 (February 27, 2009). Consistent with this interpretation, the Department's questionnaire did not identify price and quantity as the only material terms of sale, but, rather, referred to them as examples of material terms of sale. See the Department's July 1, 2010, questionnaire at Appendix I (page 1-5). Therefore, because there are identified instances on the record of this review in which delivery of the merchandise was inconsistent with the delivery terms in the final versions of Yieh Phui's contracts with its U.S. customers, it is appropriate to consider such changes in the context of the date of sale analysis in this review. Yieh Phui argues that Nakornthai 2009 supports treating a delivery term as "material" only if a change to the term results in a change to the shipment dates which, in turn, affects the calculated credit expenses. Even if this were required, the record of this review indicates that shipment dates varied from what had been identified in the contracts, as indicated by U.S. Steel and as discussed below.

For seven of the 62 U.S. sale contracts, the agreed-upon delivery tenn in what Yieh Phui identified as the final contract that prohibited partial shipments was not fulfilled. Yieh Phui, citing to one example, argues that despite the contractual prohibition of partial shipments, pre-contract correspondence on the record indicates partial shipments could be allowed as long as there was prior approval from the customer. Regardless of whether Yieh Phui and the U.S. customers agreed to a change to this tenn after the contract, it is evident that Yieh Phui did not fulfill that tenn of those contracts which Yieh Phui purported were final.

In addition, as U.S. Steel has noted, in some instances for U.S. sales the actual shipment dates varied from those identified in the contracts. See U.S. Steel's rebuttal brief, at 3-4, citing Yieh Phui's November 9,2010, supplemental questionnaire response at Exhibit 7 and Exhibit 27, and Yieh Phui's September 29,2010, supplemental questionnaire response at Exhibit 21. The instances cited by the petitioner involve variations in shipment date from those in the contract. The variation in shipment dates affects the calculation of imputed credit expenses, a factor cited in Nakornthai 2009 as a basis for concluding the delivery tenns were "material" for purposes of date of sale analysis. The fonnula used to calculate imputed credit is gross unit price times U.S. dollar interest rate times days outstanding divided by 365. See Yieh Phui's August 23, 2010, Section B-D response at 87. The "days outstanding" is defined as "the difference between the shipment date and the actual payment date...." See Yieh Phui's August 23,2010, Section B-D response at 88. Therefore, changes to shipment dates may be expected to effect the imputed credit calculation, though by how much is not certain given that another variable, "actual payment date," may also change. For additional analysis, see the October 6,2011 "Final Analysis Memorandum for Yieh Phui Enterprise Co., Ltd. (Yieh Phui): Circular Welded Carbon Steel Pipes and Tubes from Taiwan (A-583-008), May 1,2009 - April 30, 2010."

Also, the fact pattern on the record of this review differs from those in the various other cases cited by Yieh Phui. In Korean Pipe, the Department found that the material tenns of sale for U.S. transactions "are set on the contract date and any subsequent changes are usually immaterial in nature or if material, rarely occur," and that "there is no infonnation on the record indicating that the material tenns of sale change frequently enough on U.S. sales so as to give both buyers and sellers any expectation that the final tenns will differ from those agreed to in the contract." See Korean Pipe at 32836. In contrast, the record of this review indicates that the changes in material tenns of sale after either reported contract date (initial or final) were not rare, as there were changes to material tenns of sale after the reported final contract date for multiple sales to multiple customers. See Sahaviriya at 1280.

In Thai Pipe, while the Department stated that "most of the changes {in quantity} were within the overall weight tolerance agreed to by respondents and customers in each contract" (thereby indicating some were not), the Department concluded that "the evidence on the record...shows that there were no changes in prices and overall quantity set forth in the contract for all subject merchandise that was shipped and invoiced." See Thai Pipe, at Issue 1 of accompanying Issues and Decision Memorandum. The fact pattern described in Thai Pipe (i.e., "no changes in prices and overall quantity set forth in the contract for all subject merchandise that was shipped and invoiced") does not exist in the instant review, as there were changes in quantity after the contracts were agreed to, including one for which no new contract was issued. Furthennore, there were changes in delivery terms, including some that affected the calculation of imputed credit expenses.

In Sulfanilic Acid, the Department used various contract amendment dates as the date of sale for certain shipments because prices changed on those dates, but used the original contract date for date of sale of other shipments because the Department was satisfied those shipments were made subject to the terms of the underlying agreement. See Sulfanilic Acid, at Issue 1 of the accompanying Issues and Decision Memorandum. In other words, in that case, the Department used as sale date what amounted to a final contract date, after which terms of sale were not changing: for some sales, the initial contract dates were determined to have been final contract dates, while for other sales, the date of contract amendments were determined to be the final contract dates. However, in the instant review, as noted above, material terms of sale were changing not only after the reported initial contract dates, but also after the reported final contract dates.

In Habas Remand, the Department on voluntary remand changed the date of sale from invoice date to contract date when it recognized that the single instance of change in material terms that it had identified, a billing adjustment, was in fact directly related to a clause in the contract. This decision was later upheld. See Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States, Court No. 05-00613, Slip Op. 07-167 at 59 (November 15,2007). In contrast, in the instant review there were changes in material terms of sale after contract dates, including quantity and delivery terms. The quantity changes (one after reported initial contract date, and one after reported final contract date) were not directly related to any clause in the contracts, and neither were the changes involving partial shipments.

Yieh Phui has also referred to differences in sales processes as supporting use of contract date as date of sale for U.S. sales, in contrast to invoice date for its home market sales, referencing the discussion of these factors in Korean Pipe. Yieh Phui argues that substantial evidence shows the contract date reflects the date on which the parties to its U.S. sales had a true "meeting of the minds." However, in Sahaviriya, the CIT noted the importance the Department attributes to changes in material terms of sale when it stated that "{i} n choosing a date of sale, Commerce weighs the evidence presented and determines the significance of any changes to the terms of sale involved." See Sahaviriya, at 1280. The record evidence indicates that material terms of sale, including quantity and delivery terms, were subject to change, and did in fact change. With respect to the differences in sales processes noted by Yieh Phui, it has not provided evidence that the variations in sales processes support use of a date other than invoice date as the date of sale, the presumptive sale date under the Department's regulations.

With respect to formal negotiation and contracting procedures, while it is true that Yieh Phui's U.S. sales process involved transfer of written price inquiries, order confirmations, and sales contracts, and that the contracts identified material terms of sale, the fact that those material terms of sale were subject to change, and did in fact change, indicates that contract date is not an appropriate date of sale. Yieh Phui states the initial sales contracts were only amended in two out of 62 instances (involving quantity), but the record only identifies a change via a revised sales contract for one of those two instances, an indication that changes in material terms are not always recorded via an amended contract. Furthermore, there is no evidence that the seven contracts for which the "no partial shipments" delivery term was not met, including the several for which the contracted shipment date was not met, had been amended. In any case, regardless of whether any of those seven contracts were later amended after the final reported contract date, these changes, along with those to quantity, demonstrate that use of the final reported contract date as date of sale would be inappropriate. The existence of formal order confirmations and written contracts did not prevent subsequent changes to material terms of sale.

With respect to Yieh Phui's argument that long lead times are required for U.S. sales (weight-averaged period of 82 days between contract date and invoice date for U.S. sale observations), because Yieh Phui can be assumed to be unwilling to incur the costs associated with the production of made-to-order products unless and until the material terms of sale have been established, the fact remains that material terms of sale not only were subject to change, but did change in multiple instances for multiple customers. In any case, the disincentive to incur production costs would date only from production of the made-to-order merchandise, not from the prior contract signing, and Yieh Phui has conceded it is unable to report the time between production and shipment for U.S. sales because Yieh Phui does not maintain finished inventory records by market. See Yieh Phui's November 9,2010, supplemental questionnaire response at 39.

Yieh Phui refers to the "large quantities" associated with U.S. sales as a reason why it and its U.S. customers expected that a certain amount of lead time was required which, in turn, supports the conclusion that it would have finalized material terms of sale in advance of production, shipment, and invoicing. While Yieh Phui notes that the average quantities per U.S. contract and U.S. invoice exceeded the average quantities per home market invoice by several times, this does not demonstrate that the volumes associated with U.S. sales were such that material terms were not subject to change. As noted, the material terms did change after the reported final contract dates for multiple sales involving multiple customers.

Yieh Phui emphasized the following from the Preamble regarding what Yieh Phui refers to as "the exceptions to using the invoice date as the presumptive date of sale": "For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice." See Yieh Phui's case brief at 2. If Yieh Phui is suggesting its U.S. sale products were "custom-made," such a suggestion is misplaced, as the products it sold to the United States are not properly characterized as "custom-made." The three specifications of products sold to the United States were identified as ASTM A53, ASTM A135, and YPH-AB5-0J, and all three were also produced for and sold to home market customers. See Yieh Phui's July 29,2010, Section A response at 22. The first two are self-identified as standard specifications defined by ASTM International. ASTM A53 was created almost one hundred years ago, in 1915, and the version submitted by Yieh Phui was last revised by ASTM International in 2007, before the POR. See id. at Exhibit 22. The version of ASTM A135 submitted by Yieh Phui was last revised in 1997, over a decade before the POR. See id. at Exhibit 23. The remaining specification sold by Yieh Phui to the United States, YPH-AB5-0J, is a Yieh Phui specification product; however, pipes made to that specification, like ASTM A53 and ASTM A135, were produced for and sold in the home market, so they can hardly be characterized as "custom-made" for the U.S. market customers. See id. at 22. Furthermore, there are references to ASTM A53and ASTM A135 in Yieh Phui's standard product brochure, which is printed in both Chinese and English. See id. at Exhibit 34.

As noted, Yieh Phui emphasizes that the products sold to the U.S. customers are "made-to-order," and ifby alluding to the "custom-made" product exception Yieh Phui refers to made-to-order products sold predominantly to the U.S. market, such a conclusion regarding those products is not established by the record, because the record does not contain information about Yieh Phui's third country markets. Furthermore, even if those products (e.g., ASTM A53 pipe and ASTM A135 pipe) were made predominantly for U.S. customers, as noted above there is no way from the record to conclude when production took place as compared to shipment, as Yieh Phui has no market-specific information regarding inventory days. Regardless, the existence of changes in material terms of sale after the contracts were signed, and even after the reported final contract dates, indicate that invoice date is a better reflection of the date by which material terms of sale are set, regardless of the extent to which U.S. sales may have been "made-to-order."

With respect to other expenses which a seller like Yieh Phui would not want to incur if a sale were not final, such as arranging and paying for freight, the expenses associated with shipping the merchandise to the U.S. customer are incurred at the time of shipment, not at the time of the contract date or as the direct result of the existence of a contract. For example, the international freight was arranged for by Yieh Phui when the merchandise was ready for shipment, and the expenses were incurred by Yieh Phui as a result of individual shipments. Also, not only did Yieh Phui have no contracts or tariff rate agreements with such freight providers, but the final shipping charge was not even known until after the shipment. See, e.g., Yieh Phui's November 9, 2010, supplemental questionnaire response at 66 through 70. Furthermore, irrespective of Yieh Phui incurring such transportation expenses, material terms of sale changed after the reported final contract date.

With respect to Yieh Phui's claim that it does not behave as "a producer that believes it is free to change or breach its contracts," with respect to arrangement and payment for freight, the Department agrees that the record supports Yieh Phui's claim that it met those terms of its U.S. sale contracts, as well as those identifying the specifications to which the merchandise should be made. However, this does not negate the fact that material terms changed after the reported final contract date both with respect to quantity and with respect to delivery terms, as noted above.

Similarly, the Department does not contest Yieh Phui's claim that its U.S. customers paid for merchandise in accordance with contract requirements. Yieh Phui states that its customers "paid the contract price prior to shipment. . . ." See Yieh Phui's case brief at 13. However, Yieh Phui did not always accept payment until after it shipped the merchandise. In fact, Yieh Phui claimed that "in practice the payment which is made ... actually enters Yieh Phui's bank accounts later than the date the merchandise leaves the factory or the warehouse." See Yieh Phui's November 9,2010 supplemental questionnaire response at 50-51. Yieh Phui later clarified its narrative, stating "in the normal course of business, Yieh Phui receives payments ... from the negotiating bank by presenting the commercial invoice and bill of lading to the bank." See Yieh Phui's

January 7, 2011 supplemental questionnaire response at 25 (original emphasis). In other words, Yieh Phui did not take payment in these situations until it actually shipped the merchandise to the customer. Given that at least one material term of sale upon which payment was based (i.e., quantity) was subject to change and did change after contracts were signed, it is not surprising that payment would not be taken until those terms were truly finalized (i.e., when the merchandise was shipped and invoiced).

The Department employs invoice date as the date of sale unless a party demonstrates that the material terms of sale were established on another date (or if the Department itself, based on the record evidence, so determines). As noted above, there are multiple U.S. contracts for which the material terms of sale, specifically quantity and delivery terms, changed after the reported final contract date, as in Sahaviriya, where there were changes for "multiple contracts, representing multiple sales to multiple customers." See Sahaviriya at 1280. In short, "it cannot be gainsaid that changes to the material terms of sale occurred after execution of the final sales contract." See Sahaviriya at 1281.

In conclusion, the Department has determined, after reviewing the totality of the evidence on the record, that this evidence does not support diverging from the preswnptive date of sale (invoice date) in this review, and continues to find that the invoice date is the appropriate date of sale for U.S. sales.[2]

Comment 2: Zeroing

Yieh Phui states that in its preliminary results, the Department utilized zeroing in its margin calculation. In zeroing, the Department compares the prices of individual export transactions with monthly weighted-average normal values and excludes any amounts by which the export prices exceed the normal values when aggregating the results of the comparisons to calculate a margin. Yieh Phui states that the Department should abandon its standard zeroing practice in this review because it is inherently biased, distortive, and ultimately unlawful with respect to the United States' commitments as a member of the World Trade Organization (WTO). Yieh Phui maintains the Department should instead include all negative margin transaction amounts in Yieh Phui's margin calculations and duty assessments in the final results.

Yieh Phui states the WTO Appellate Body ruled against the Department's zeroing methodology in United States - Laws, Regulations, and Methodology for Calculating Dumping Margins (U.S.-Zeroing CEC)), WT/DS294/AB/R (April 18,2006), at paragraph 133. While this ruling applied to the specific reviews under appeal, Yieh Phui states that in a subsequent decision the WTO Appellate Body considered a broader challenge to the zeroing methodology in administrative

2 The Department has a long-standing practice of finding that, where invoice date is the preswnptive date of sale, but shipment date precedes invoice date, shipment date should be used as date of sale. See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 73 FR 55036 (September 24, 2008), and accompanying Issues and Decision Memorandum at Comment 1; and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 64 FR 30664, 30679 (June 8, 1999). Therefore, for the fmal results, we are continuing to assign the shipment date as date of sale in instances in which the shipment date precedes the invoice date.

reviews "as such." See United States - Measures Relating to Zeroing and Sunset Reviews, *WT/DC322/AB/R* (January 9, 2007) (US.-Zeroing (Japan)). Yieh Phui states the WTO Appellate Body found in that case that the use of zeroing in administrative reviews both "as such" and "as applied" was inconsistent with the requirements set forth in Articles 2.4, 9.3, and 9.5 of the Antidumping Agreement, and Article VI:2 of the GATT 1994. See U.S.-Zeroing (Japan) at paragraphs 166 and 169. Yieh Phui indicates the WTO Appellate Body, in a later ruling, emphasized it "see{s} no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the Antidumping Agreement for disregarding the results of comparisons where the export price exceeds the normal value when calculating the margin of dumping for an exporter" in the five administrative reviews at issue in that challenge See United States - Final Antidumping Measures on Stainless Steel from *Mexico,WT/DS344/ABIR* (April 30, 2008) (US.-Zeroing (Mexico)) at paragraph 103.

Yieh Phui states the Department has already recognized the futility of continuing to apply the zeroing methodology in administrative reviews, and has proposed abandoning that methodology to comply with the numerous WTO panel decisions against it. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533,81534 (December 28,2010) (Antidumping Proceedings).

Yieh Phui concludes that, in light of the aforementioned WTO decisions, the Department should incorporate the methodology and approach anticipated by the proposed rule in Antidumping Proceedings, and thereby abandon its zeroing practice when calculating a margin for Yieh Phui in the final results of this review.

AlliedlIpsco argues that zeroing is appropriate for all antidumping proceedings, including investigations as well as administrative reviews. Allied/Ipsco states that Yieh Phui did not cite any U.S. statute or U.S. regulation in its argument that the Department should not apply zeroing when calculating Yieh Phui's-dumping margin in the final results but, rather, states "the WTO Appellate Body has consistently found that the Department's use of simple zeroing in administrative reviews violates the Antidumping Agreement and GATT 1994." Allied/Ipsco states that the WTO does not establish U.S. law. AlliedlIpsco states that the Department is directed to follow U.S. law in issuing liquidation instructions to U.S. Customs and Border Protection regarding antidumping duty assessments and, therefore, the Department should summarily dismiss the WTO statements cited by Yieh Phui about how the US. law practice of zeroing violates the WTO AD Agreement by failing to include negative margins as a dumping margm.

AlliedlIpsco notes the plain language of the Tariff Act of 1930, as amended (the Act) states that the term "dumping margin" means the amount by which the normal value exceeds the export price, and that a "dumping margin" therefore can only be positive. Allied/Ipsco states the Department incorrectly found, and the courts inappropriately upheld the Department's finding, that for purposes of determining whether sales are made at less than fair value in investigations a negative margin may be considered a dumping margin, and thus subtracted from positive margins.

Allied/Ipsco states U.S. law explicitly requires that a conflict between the WTO and U.S. statute is resolved in the favor of the U.S. statute since a WTO ruling cannot overturn U.S. law. Therefore, if the Department or the courts were to have considered the meaning of the actual language of the statute, as repeatedly argued by domestic parties, the Department and the courts would have been required to deny the WTO ruling from being implemented. Therefore, in addition to refusing to address domestic parties' statutory argument based on the plain meaning of the language of the statute, the Department and courts adroitly avoided mentioning the language of the Act, other than to state that the Act was ambiguous or silent as to whether a dumping margin may be a negative margin. Allied/Ipsco states that not only was the language of the U.S. law slaughtered at the altar of the sovereignty of the WTO over U.S. Congress but so too were domestic parties' due process rights to be heard.

Allied/Ipsco states that in the 85 years that antidumping duties were determined before the WTO ruled that the U.S. law requiring that only positive margins are dumping margins violated WTO agreements, there was never any ambiguity in the U.S. law as to whether U.S. law required consideration of only positive margins as dumping margins. Indeed, no U.S. court, or any other body, has ever identified any ambiguity in the language of the Act defining the dumping margin as constituting positive margins. U.S. courts have found the Act is ambiguous as to whether the practice of setting the resulting negative margins to zero is acceptable. Allied/Ipsco states that while the Act is clear that only positive margins are dumping margins, the Act does not specify how the Department ensures that only positive margins are dumping margins. Zeroing out negative margins is one such means. But another means would be to simply disregard negative margins instead of setting their results to zero. If there were any ambiguity in the actual language of the Act as to whether only a positive margin is a dumping margin presumably someone would have identified it in the thousands of pages of briefs filed with the Department and the courts addressing the Act's definition of "dumping margin." AlliedJIpsco insists no one has ever identified such ambiguity. The Department did not begin to treat negative margins as dumping margins until after the WTO declared the U.S. law requiring dumping margins to be only positive margins violated WTO rules. When the Department followed WTO rulings by changing its practice in investigations to include negative margins as dumping margins, the Department did not cite any ambiguity in the U.S. law, but instead stated that it was changing U.S. law to conform to the WTO rulings.

Allied/Ipsco argues that stating that the language of the Act is silent as to whether a negative margin is a dumping margin is merely a ruse for not addressing the plain meaning of the language of the Act. Allied/Ipsco states that if the Department or the courts had simply addressed domestic parties' statutory construction, this ruse would not have been available as a justification for implementing the WTO ruling.

Allied/Ipsco states the Courts cited comity with the WTO as a guiding principle in dismissing domestic parties' arguments, but argue that "comity" in this context is simply a euphemism synonymous with accepting the sovereignty of the WTO over U.S. Congress in determining the U.S. trade law. Allied/Ipsco states the courts further emphasized that the U.S. law is unfair. But establishing whether only positive margins are dumping margins is fair or foul is a decision within the purview of Congress, not the courts nor the WTO. Until someone at the Department or the courts with intellectual integrity or respect for the language of the U.S. law addresses domestic parties' construction of the plain language of the statute, or a final ruling of the courts on the issue has been issued, domestic parties will continue to assert that the Act requires that only positive margins are dumping margins, regardless of WTO rulings requiring the inclusion of both positive and negative margins as dumping margins.

Allied/Ipsco avers that, notwithstanding the fact that the language of the Act requires that only a positive margin is a dumping margin, assuming *arguendo* that the Department has the discretion to interpret the language of the statute defining the dumping margin in the Act to include a negative margin as a dumping margin in an investigation, this discretion could not extend to administrative reviews. Allied/Ipsco state the offset of positive margins by negative margins in administrative reviews is inconsistent with the explicit statutory mandate of the Act, which requires an entry-specific assessment for each individual entry transaction based upon an individual entry transaction-specific dumping margin. The offset of positive margins by negative margins involves multiple dumping margins, whereas the plain language of the statute requires only a single dumping margin to determine the antidumping duty assessment for an individual entry transaction in an administrative review. Allied/Ipsco states the Act provides the explicit statutory requirement of entry-specific duty assessment. Allied/lpsco argues the language of the U.S. dumping law equates the dumping margin of the individual entry transaction in reviews with the antidumping duty assessment for that individual entry transaction, and thus precludes the offset of the dumping margin for an individual entry transaction by other margins that were computed for other entry transactions.

Moreover, Allied/Ipsco states the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) ruled that the offset of positive transaction-specific margins in reviews with negative transaction-specific margins in reviews would result in the U.S. government owing an importer of fairly traded merchandise a payment, which was "a result not contemplated by Congress." See The Timken Company v. United States, 354 F.3d1334, 1341 (Fed. Cir. 2004) (Timken). Allied/Ipsco states there is no question that the intent of Congress, as well as the plain language of the statute, requires the imposition of an antidumping duty whenever the individual entry transaction-specific U.S. import price is less than the normal value to which it is compared, even when the weighted-average of all U.S. import prices in the aggregate is greater than the weighted-average normal value to which it is compared.

In short, Allied/Ipsco argues that regardless of whether the Department is constrained by the statutory definition of the "dumping margin" in investigations in offsetting positive margins by negative margins, the Department is clearly constrained from offsetting the margin for one individual entry transaction in a review by the margin for another individual entry transaction margin, because the statute mandates the determination of the antidumping duty assessment based on the dumping margin for each individual entry transaction.

U.S. Steel states the statute requires the use of zeroing in all segments of an antidumping proceeding. Acknowledging that the claim that the statute requires zeroing is currently before the Supreme Court in United States Steel Corporation v. United States (No. 10-1433) and Nucor

Corporation v. United States (No. 10-1439), U.S. Steel argues that, at a minimum, the use of zeroing represents a reasonable interpretation of the statute.

If zeroing is not used, U.S. Steel argues, the provisions of Section 777A(d) of the Act, enacted in 1994 as part of the Uruguay Round Agreements Act, would be rendered meaningless because the margin result will be exactly the same regardless of whether an average-to-average or average-to-transaction methodology is used. U.S. Steel notes that this conclusion has been recognized by both the United States government and no less than four WTO panels. See, e.g., Report of the Panel, United States-Laws, Regulations, and Methodology for Calculating Dumping Margins, *WT/DS294/R*, October, 31 2005 at 142, para.7.266. U.S. Steel states there would have been no point for Congress to change the statute in 1994 to establish different comparison methodologies if the same result would be achieved regardless of which approach was used. As the Supreme Court and the Federal Circuit have repeatedly held, the rules of statutory construction require that a statute be interpreted so as to avoid rendering superfluous any provision of that statute. See, e.g., TRW Inc. v. Andrews, 534 U.S. 19,31 (2001).

U.S. Steel states that even assuming zeroing is not mandated by the statute, it is a reasonable interpretation of the statute, and the courts have repeatedly upheld the use of zeroing in administrative reviews. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342-1345 (Fed. Cir. 2004) and NSK Ltd. v. United States, 416 F. Supp. 2d 1334, 1338-39 (CIT 2006). U.S. Steel states the Department has continued to use zeroing in administrative reviews notwithstanding its decision to stop the use of zeroing in investigations in Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27,2006).

U.S. Steel notes that the Department and the courts have consistently determined that adverse WTO decisions like those cited by Yieh Phui are irrelevant and provide no basis to invalidate or overturn the Department's use of zeroing. See, e.g., Corus Staal BV v. United States, 395 F.3d 1343, 1349 (Fed. Cir. 2005) and JTEKT Corp. v. United States, Slip Op. 09-147 (CIT December 18,2009).

U.S. Steel states the proposed modification to stop zeroing in administrative reviews in Antidumping Proceedings makes it abundantly clear that, if adopted, the Department would not apply it to this review. The Department notes that any changes, if made, will apply only to reviews "for which a preliminary result is issued more than 60 business days after the date of pilblication of the Department's Final Rule and Final Modification." See Antidumping Proceedings at 81535.

Department's Position:

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

Section 771(35)(A) of 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). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than export price (EP) or constructed export price (CEP). We disagree with the respondents that the Department's "zeroing" practice is an inappropriate interpretation of the Act. Because no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of section 771(35) of the Act. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken); and Corus Staal BV v. United States, 395 F.3d 1343, 1347-1349 (Fed. Cir. 2005) (Corus I).

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 Department applies this section by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term "aggregate dumping margins" in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel the dumping margins found on other sales.

This does not mean that non-dumped transactions are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect all non-dumped transactions examined during the paR; the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped transactions is included in the numerator. Thus, a greater amount of non-dumped transactions results in a lower weighted-average margin.

The Federal Circuit 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." See Timken, 354 F.3d at 1343. 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 interpreted 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. See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II); and NSK Ltd. v. United States, 510 F.3d 1375 (Fed. Cir. 2007) (NSK).

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006) (Final Modification in Investigations). 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's interpretation of the statute was unchanged in other contexts.

It is reasonable for the Department to interpret the same ambiguous language differently when using different comparison methodologies in different contexts. In particular, the use of the word "exceeds" in section 771(35)(A) of the Act can reasonably be interpreted in the context of an antidumping investigation to permit negative average-to-average comparison results to offset or reduce the amount of the aggregate dumping margins used in the numerator of the weighted-average dumping margin as defined in section 771(35)(B) of the Act. The average-to-average comparison methodology typically applied in antidumping duty investigations averages together high and low prices for directly comparable merchandise prior to making the comparison. This means that the determination of dumping necessarily is not made for individual sales, but rather at an "on average" level for the comparison. For this reason, the offsetting methodology adopted in the limited context of investigations using average-to-average comparisons is a reasonable manner of aggregating the comparison results produced by this comparison method. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, and treated in the calculation of the weighted average dumping margin under section 771(35)(B) of the Act, it is reasonable for the Department to consider whether the comparison result in question is the product of an average-to-average comparison in an investigation, or an average-to-transaction comparison in an administrative review.

The Federal Circuit has considered the reasonableness of the Department's interpretation not to apply zeroing in the context of investigations using average-to-average comparisons, while continuing to apply zeroing in the context of investigations using average-to-transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act. See U.S. Steel Corp., v. United States, 621 F. 3d 1351 (Fed. Cir. 2010) (U.S. Steel). In U.S. Steel, the Federal Circuit was faced with the argument that, if zeroing was never applied in investigations, then the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The Court acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring. See U.S. Steel, 621 F. 3d at 1363. The Court then affirmed as reasonable the Department's application of its modified average-to-average comparison methodology in investigations in light of the Department's stated intent to continue zeroing in other contexts. Id.

In addition, the Federal Circuit recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department's continued application of "zeroing" in the context of an administrative review completed after the implementation of the Final Modification in Investigations. See SKF USA Inc. v. United States, 630 F.3d 1365 (Fed. Cir. 2011) (SKF). In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination to apply zeroing for average-to-transaction comparisons in this administrative review is consistent with the Federal Circuit's recent decision in SKF.

Furthermore, in Coms I, the Federal Circuit 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. See Coms I, 395 F. 3d at 1347. That is, the Court explained that the holding in Timken - that zeroing is neither required nor precluded in administrative reviews - applies to antidumping duty investigations as well. Thus, Coms I does not preclude the use of zeroing in one context and not the other.

Moreover, the Federal Circuit's recent decision in another case does not require the Department to change its methodology in this administrative review. See Dongbu Steel Co., Ltd., v. United States, 635 F.3d 1363 (Fed. Cir. 2011) (Dongbu). The holding of Dongbu, and the more recent decision in JTEKT Corporation v. United States, 2010-1516, -1518 (Fed. Cir. June 29, 2011) (JTEKT), was 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 Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in neither Dongbu nor JTEKT overturned prior Federal Circuit decisions affirming zeroing in administrative reviews, including SKF, which we discuss above, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in Dongbu and JTEKT, the Department here is providing additional explanation for its changed interpretation of the statute subsequent to the Final Modification in Investigations[3] - 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 long string of Federal Circuit holdings in Dongbu, JTEKT, U.S. Steel, SKF, Timken, and Coms I.

Regarding the WTO reports cited by Yieh Phui finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, we note that the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. See Coms **1,395** F.3d at 1347-49; accord Coms II, 502 F.3d at 1375; and NSK, 510 F.3d 1375. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the DRAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.c. 3533(g); and Zeroing Notice, 71 FR at 77722. With respect to U.S.-Zeroing (Japan), and U.S.-Zeroing (Mexico), the steps

3 See Final Modification in Investigations, 71 FR at 77722; and Antidwnping Proceedings: Calculation of the Weighted - Average Dumping Margin During an Antidwnping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (Jun. 26,2007) (collectively, Final Modification for Antidumping Investigations).

taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

Finally, with respect to Yieh Phui's argument that we should adopt the methodology proposed in Antidumping Proceedings here, we disagree that there is a basis for changing the Department's approach of calculating weighted-average dumping margins in the instant administrative review. Proposed regulations by their very nature are not binding to an agency. See Viraj Forgings Ltd., v. United States, 206 F. Supp. 2d 1288, 1293 (CIT 2002) (rejecting plaintiffs reliance on a proposed rule as basis for receiving a zero margin). The methodology proposed in Antidumping Proceedings is only a proposal that remains subject to review of comments from the public and statutory consultation requirements involving Congressional committees, among others. See section 123(g)(1) of the URAA. It does not provide legal rights or expectations for parties in this administrative review. Additionally, the methodology proposed in Antidumping Proceedings would not apply to the present administrative review because normally, "{a} final rule or other modification...may not go into effect before the end of the 60-day period beginning on the date which consultations {between the Trade Representative heads of the relevant departments or agencies, and appropriate Congressional committees} ...begin." See section 123(g)(2) of the URAA. Because the final results in this administrative review will be completed prior to the effective date of the final rule, any change in the treatment of non-dumped sales, pursuant to the methodology proposed in Antidumping Proceedings (if implemented) would not apply to this administrative review.

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 with respect to other transactions.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margins for all of the reviewed firms in the Federal Register.

Agree ✓ Disagree _

Ronald K. Lorentzen

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

October 6, 2011

Date