A-583-850
Investigation
Public Document
E&C/Office I: TES

DATE: July 10, 2014

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

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

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Less than Fair Value Investigation of Certain Oil Country Tubular Goods from Taiwan

---

I. SUMMARY

In this final determination, the Department of Commerce (Department) finds that certain oil country tubular goods (OCTG) from Taiwan are being, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is July 1, 2012, through June 30, 2013.

We analyzed the comments of the interested parties in this investigation. As a result of this analysis, and based on our findings at verification, we made changes to the margin calculations for the respondents in this case, Chung Hung Steel Corp. (CHS) and Tension Steel Industries Co., Ltd. (Tension). We recommend that you approve the positions in the "Discussion of the Issues" section of this memorandum.

Below is the complete list of the issues in this investigation for which we received comments from parties.

1. Affiliation
2. Collapsing
3. Rebates
4. Date of Sale
5. Treatment of Non-Prime Pipe
6. Depreciation
7. Value Added Tax
8. Certifications

II. BACKGROUND

On February 25, 2014, the Department published the *Preliminary Determination* in the LTFV investigation of OCTG from Taiwan.[1] The Department conducted verifications of CHS from March 4 through March 7, 2014, and March 10 through March 14, 2014, and of Tension from March 10 through March 12, 2014, and March 17 through March 21, 2014. On March 27, 2014, Maverick Tube Corporation (one of the petitioners),[2] requested that the Department conduct a hearing in this investigation, which the Department conducted on May 21, 2014.[3] On April 3, 2014, the Department amended the *Preliminary Determination*.[4]

We invited parties to comment on the *Preliminary Determination*. We received case and rebuttal briefs from the petitioners, CHS, and Tension in May 2014. Based on our analysis of the comments received, as well as our findings at verification, the weighted-average dumping margins determined in this final determination differ from those in the *Preliminary Determination*.

III. SCOPE OF THE INVESTIGATION

The merchandise covered by the investigation is certain oil country tubular goods (OCTG), which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, regardless of end finish (*e.g.*, whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (API) or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached. The scope of the investigation also covers OCTG coupling stock.

Excluded from the scope of the investigation are: casing or tubing containing 10.5 percent or more by weight of chromium; drill pipe; unattached couplings; and unattached thread protectors.

The merchandise subject to the investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7304.29.10.10, 7304.29.10.20, 7304.29.10.30, 7304.29.10.40, 7304.29.10.50, 7304.29.10.60, 7304.29.10.80, 7304.29.20.10, 7304.29.20.20, 7304.29.20.30, 7304.29.20.40, 7304.29.20.50, 7304.29.20.60, 7304.29.20.80, 7304.29.31.10, 7304.29.31.20, 7304.29.31.30, 7304.29.31.40, 7304.29.31.50, 7304.29.31.60, 7304.29.31.80, 7304.29.41.10, 7304.29.41.20, 7304.29.41.30, 7304.29.41.40, 7304.29.41.50, 7304.29.41.60, 7304.29.41.80, 7304.29.50.15, 7304.29.50.30, 7304.29.50.45, 7304.29.50.60, 7304.29.50.75, 7304.29.61.15, 7304.29.61.30, 7304.29.61.45, 7304.29.61.60, 7304.29.61.75,

---

[1] *See Certain Oil Country Tubular Goods From Taiwan: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 10495 (February 25, 2014) (*Preliminary Determination)*.
[2] Boomerang Tube, Energex Tube, a division of JMC Steel Group, Maverick Tube Corporation, Northwest Pipe Company, Tejas Tubular Products, TMK IPSCO, United States Steel Corporation, Vallourec Star, L.P., and Welded Tube USA Inc. (collectively, the petitioners).
[3] *See* Hearing Transcript dated May 21, 2014.
[4] *See Certain Oil Country Tubular Goods From Taiwan: Amended Preliminary Negative Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 18667 (April 3, 2014).

7305.20.20.00, 7305.20.40.00, 7305.20.60.00, 7305.20.80.00, 7306.29.10.30, 7306.29.10.90, 7306.29.20.00, 7306.29.31.00, 7306.29.41.00, 7306.29.60.10, 7306.29.60.50, 7306.29.81.10, and 7306.29.81.50.

The merchandise subject to the investigation may also enter under the following HTSUS item numbers: 7304.39.00.24, 7304.39.00.28, 7304.39.00.32, 7304.39.00.36, 7304.39.00.40, 7304.39.00.44, 7304.39.00.48, 7304.39.00.52, 7304.39.00.56, 7304.39.00.62, 7304.39.00.68, 7304.39.00.72, 7304.39.00.76, 7304.39.00.80, 7304.59.60.00, 7304.59.80.15, 7304.59.80.20, 7304.59.80.25, 7304.59.80.30, 7304.59.80.35, 7304.59.80.40, 7304.59.80.45, 7304.59.80.50, 7304.59.80.55, 7304.59.80.60, 7304.59.80.65, 7304.59.80.70, 7304.59.80.80, 7305.31.40.00, 7305.31.60.90, 7306.30.50.55, 7306.30.50.90, 7306.50.50.50, and 7306.50.50.70.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the investigation is dispositive.

IV. MARGIN CALCULATIONS

We calculated export price (EP) and normal value (NV) using the same methodology stated in the *Preliminary Determination*, except as follows:

<u>CHS</u>

- We granted CHS an offset to its reported costs for the offset it normally receives for non-prime pipes.
- We applied the Transactions Disregarded rule to the inputs that the affiliated suppliers of CHS received from their own affiliate suppliers.
- We adjusted China Steel Corporation's general and administrative (G&A) expense ratio by excluding dividend income.
- We applied the Major Input rule to the affiliated purchases of CHS.
- We adjusted CHS's G&A expense ratio to include certain miscellaneous income and expense items.

<u>Tension</u>

- We denied certain rebates as adjustments to EP and NV.
- We adjusted the offset for non-prime pipes to reflect actual amounts received.
- We excluded certain financial expense and income figures from Tension's G&A expense ratio.
- We reduced the cost of goods sold denominator in the G&A and financial expense ratio calculations by the revenue associated with the sale of non-prime products, as the costs were reported net of this offset.

V. DISCUSSION OF THE ISSUES

Affiliation

<u>Comment 1</u>: The petitioners argue that Tension and Company A are affiliated because Company A can control Tension through a close supplier relationship. According to the petitioners, the

Department established a two-part analysis for determining affiliation based on a close supplier relationship: first, the Department will determine whether the buyer or supplier has become reliant on the other; second, only if the Department determines that the buyer or supplier has become reliant on the other will it proceed to determine whether one party is in a position to control the other, with the potential to impact decisions relating to the subject merchandise. The petitioners assert that both prongs of the test are satisfied because Tension is reliant on Company A for its supply of the most important input in OCTG manufacturing, leaving Company A in a position to control Tension, and the relationship has the potential to - and actually does - impact decisions concerning the subject merchandise.

The petitioners contend that, while the control prong of the analysis does not require that one party actually exercises control over the other, the reliance prong requires that one party actually become reliant on the other, but that a buyer may be reliant on its supplier even if it is theoretically possible for the buyer to source a certain amount of the input from another supplier. Citing *SSWR from Korea*, the petitioners claim that a buyer is reliant on its supplier if, as a matter of "business and economic reality," the relationship is "significant and could not be easily replaced."[5] The petitioners further argue that Department's reliance on *TIJID*[6] in the *Preliminary Determination* was misplaced.

Because of the proprietary nature of the remainder of the petitioners' comments, *see* the memorandum to Christian Marsh entitled "Antidumping Duty Investigation of Certain Oil Country Tubular Goods from Taiwan: Proprietary Issues" (July 10, 2014) (Proprietary Issues Memorandum) for further description of the petitioners' arguments.

Tension contends that, regarding close supplier relationships, the Department previously determined that the threshold issue is whether either the buyer or seller has become reliant on the other and only if such reliance exists does the Department determine whether one of the parties is in a position to exercise restraint or direction over the other. According to Tension, the Court of International Trade (CIT) upheld the Department's practice.

Tension asserts that the record indicates that it does have alternative sources of API grade hot-rolled steel coil, and that it did utilize them during the POI. Tension argues that, even though its purchases from other unaffiliated suppliers were not large and it decided not to continue purchasing from those suppliers, the record does not indicate that it was forced or required to do so. Rather, Tension contends that the record indicates that its decision to source the API grade hot-rolled steel coil primarily from Company A is a matter of choice and this choice is based on comparative advantage.

Tension argues that the record evidence does not support a decision like one the Department made in *SSWR from Korea* on a similar issue. Tension contends that, in addition to what the Department pointed out in the *Preliminary Determination*, the fundamental differences between the facts of *SSWR in Korea* and those in the instant investigation are that: (i) Dongbang was the sole Korean buyer of black coil and POSCO/Changwon was the sole supplier; and (ii) Dongbang

---

[5] *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Korea*, 63 FR 40404, 40410 (July 29, 1998) (*SSWR from Korea*).
[6] *See TIJID, Inc. v. United States*, 366 F. Supp. 2d 1286 (Ct. Int'l Trade 2005) (*TIJID*).

was unable to develop an alternative source of supply of black coil. In *SSWR in Korea*, Tension claims, the Department found the relationship to be significant and not easily replaced mainly because the reliance between POSCO/Changwon and Dongbang was not one-way, but rather two-way reliance because each was the sole transaction party of black coil to the other. Moreover, according to Tension, Dongbang was unable to develop an alternative source of black coil. Tension contends that, in this investigation, the record shows that Tension did not source coils used for producing OCTG entirely from Company A; Tension did have alternative sources for the coils, and it indeed utilized them.

See the Proprietary Issues Memorandum for further discussion of Tension's arguments.

Department's Position: We find that Tension and Company A are not affiliated.

Section 771(33)(G) of the Act instructs that any person who controls any other person and such other person shall be considered to be affiliated and that a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

19 CFR 351.102(b)(3) instructs that, in determining "whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product."

The SAA identifies close supplier relationships as those relationships where "the supplier or the buyer becomes reliant upon the other."[7] Although there is no statutory or regulatory standard for determining whether either the supplier or the buyer is reliant upon the other, the court affirmed in *TIJID* the Department's determination that a "close supplier relationship" is established when a party demonstrates that the relationship is significant and could not be easily replaced.

We determine that Tension is not affiliated with Company A. As noted above, a close supplier relationship is defined as one in which the buyer or the seller becomes "reliant" on the other. Here, however, record evidence establishes that Tension is not reliant on Company A either for supply of the input or for financing; nor can Company A be said to "control" Tension. Tension could, and did, look to other unaffiliated suppliers of the input.[8]

Contrary to the petitioners' assertion, the facts in *SSWR from Korea* are not "nearly identical" to the facts in this investigation. In *SSWR from Korea*, we found that "Dongbang has not obtained suitable black coil from alternative sources but continues to exclusively rely upon POSCO/Changwon for this input."[9] In contrast to *SSWR from Korea*, in this investigation, Tension did find and bought suitable hot-rolled steel coil from alternative suppliers.

[7] *See SAA* at 838.
[8] *See* Tension's December 6, 2013, supplemental response at Exhibits 1 and 2.
[9] *See SSWR from Korea*, 72 FR at 59739-40.

Further, we disagree with the petitioners that *TIJID* is inapplicable. While it is true that *TIJID* dealt with the potential reliance of a foreign supplier on its U.S. buyer, the petitioners have not explained how such a relationship "involves a significantly different commercial dynamic" such that the court's findings in TIJID are inapplicable here. Whether we are looking at the potential reliance of a foreign supplier on its U.S. buyer or the potential reliance of a buyer on its supplier, the fact remains that the court in *TIJID* upheld the Department's determination not to find reliance merely on the basis of the proportion of purchases or sales between the buyer and the supplier, even where that proportion was 100 percent. Thus, the petitioners attempt to discredit *TIJID* as applicable precedent to this investigation fail.

Because of the proprietary nature of this issue, *see* the Proprietary Issues Memorandum for further discussion of this issue.

Collapsing

<u>Comment 2</u>: Citing section 771(33)(F) of the Act, the petitioners contend that Tension and Company B are affiliated because they are both controlled by Company A. The petitioners argue that Tension and Company B should be collapsed because they produce identical merchandise and because there is significant potential for manipulation of price and production.

Citing 19 CFR 351.401(f), the petitioners assert that two or more affiliated producers' affiliated entities should be collapsed when (1) they have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities; and (2) there is a significant potential for the manipulation of price or production. According to the petitioners, Tension and Company B are both large producers of identical subject merchandise, such that substantial retooling of facilities would not be needed to restructure manufacturing priorities.

Tension argues that it should not be collapsed with Company B. According to Tension, it is not affiliated with Company A because Company A does not control Tension through a close supplier relationship. Tension contends that, as Company A does not control Tension, Tension cannot be found to be affiliated with Company B due to alleged "common control" by Company A.

<u>Department's Position</u>: We find that Tension and Company B should not be collapsed. As discussed above, Company A does not control Tension. Because the petitioners' collapsing argument is based upon the common control of Company A over Tension and Company B, we find that Company B and Tension should not be collapsed.

Rebates

<u>Comment 3</u>: the petitioners argue that the Department should reject Tension's price adjustments to its U.S. and Canadian customers because they are not reasonably attributable to OCTG, are unsupported by record evidence, and are inconsistent with commercial reality.

Citing 19 CFR 351.40l(c), the petitioners contend that the Department makes price adjustments provided that the adjustment is reasonably attributable to the subject merchandise or the foreign like product. The petitioners claim that, because Tension provided no written rebate agreements between either Tension and Company A or Tension and its customers regarding the rebate scheme, the Department is forced to rely on mere assertions by Tension without any documentary support. According to the petitioners, these characterizations make clear that Tension does not control the rebates. The petitioners assert that Tension reported that this rebate is granted entirely at Company A's discretion and that there is no agreement on the terms or conditions either before or after Tension's purchases of hot-rolled steel coil. As a result, the petitioners allege, this is not a rebate on OCTG. According to the petitioners, it is, at best, a non-commercial gift provided to Tension's customers. The petitioners claim that there is no contemporaneous evidence on the record that the customers were aware that they qualified for this gift.

Citing *Thermal Paper*, the petitioners contend that the Department only allows rebates where a respondent demonstrates that its customers are "aware at or before the time of sale of the final . . . rebate amount to be applied," and "support{s} the {rebates} through any formal written agreement which outlines the terms and conditions which apply to the customers."[10] The petitioners claim that Tension has not met either of these conditions.

The petitioners contend that the terms and conditions of the rebate scheme are not reflected in any sales or other documents. The petitioners observe that some, but not all, of Tension's sales contracts have rebate clauses, indicating that when Tension intended at the time of sale for rebates to be a possibility, it so stated in the sales contract. Likewise, the petitioners assert that the omission of these clauses in other contracts is dispositive evidence that no rebate was considered at the time of those sales. Moreover, the petitioners claim the rebate clauses fail to establish the rebate scheme's terms and conditions and leave Tension's customers unaware of even an approximate potential rebate amount.

Observing that Tension claimed that it only grants rebates to its customers if and when Company A grants Tension a rebate on Tension's purchases of hot-rolled steel coil, the petitioners argue that Tension provided no evidence whatsoever regarding rebate transactions between itself and Company A that are linked to Tension's purchases of API grade hot-rolled steel coil. According to the petitioners, the little evidence that is on the record regarding Company A's sales to Tension shows that the alleged "retroactive price decline rebate" from Company A to Tension for purchases of API grade hot-rolled steel coil simply does not exist. Citing the sales verification report, the petitioners assert that, at the very least, it cannot be verified, which the Department acknowledged. The petitioners further allege that there is no relationship between the amounts in Tension's price quotations and the ultimate rebate amounts.

The petitioners argue that Tension arbitrarily allocated price adjustments to individual sales. The petitioners contend that the only documents that Tension provided to support the allocation of rebates to particular sales are its so-called "Price Rebate Statements" and that even these are

---

[10] *See Lightweight Thermal Paper From Germany: Notice of Final Results of the 2009-2010 Antidumping Duty Administrative Review*, 77 FR 21082 (April 9, 2012) (*Thermal Paper*), and accompanying Issues and Decision Memorandum at Comment 2.

suspect. The petitioners assert that there appears to be no connection between the timing of the Price Rebate Statements and the sales to which they apply and that evidence on the record suggests that at least one of the Price Rebate Statements is likely not a genuine business document.[11] The petitioners claim that this undermines the credibility of the entire rebate scheme and suggests that any payments from Tension to its customers are not related to the sale of OCTG.

The petitioners argue that Tension provided no legitimate explanation for the rebate scheme, which otherwise is inconsistent with commercial reality. The petitioners claim that independent entities operating according to arms-length commercial principles do not base significant determining factors of prices in major business transactions on phone calls and mutual trust; rather, formalized and legally binding terms and conditions are set forth. The petitioners further claim that profit-oriented commercial entities rarely, if ever, give their customers financial gifts without obligation or other explanation. The petitioners assert that this is precisely what Tension and Company A do through their alleged rebate scheme.

The petitioners argue that Tension's claims that it used the rebates as an incentive to promote sales strains credulity given the customer's utter lack of certainty regarding its receipt of any rebate at all, let alone the amount of that rebate. According to the petitioners, even if Tension's customers are aware of Company A's prices for hot-rolled steel coil, the record shows that Tension and Company A have in practice deviated so significantly from that basis for granting the rebates that it is essentially meaningless. Moreover, the petitioners contend, even when the "terms" of the rebate scheme are supposedly followed, it regularly results in sales to the same customer in the same month, some of which result in a rebate and others that do not, rendering it utterly unpredictable.

The petitioners also assert that a rebate that is granted months, or even years, after a sale is completed cannot effectively incentivize that sale. The petitioners claim that these time lags highlight yet another inconsistency in the alleged rebate scheme. According to the petitioners, Tension claims that it receives hot-rolled steel coil price quotations from Company A months in advance of the delivery of hot-rolled steel coil used to produce the merchandise for particular sales contracts, and that the rebates are meant to reflect market price fluctuations during this lead time. The petitioners allege that, although Tension can easily retrieve an up-to-date price quotation, Tension, without explanation, decides to base OCTG sales prices on hot-rolled steel coil price quotations that are months old at the time of contract.

The petitioners argue that, if the Department does not find that Tension's rebates must be rejected entirely, it should, at best, treat them as indirect selling expenses, rather than as direct selling expenses, and allocate them accordingly.

Finally, the petitioners argue that the Department should apply adverse facts available in its analysis of Tension's rebates because Tension intentionally withheld information and significantly impeded the Department's investigation. The petitioners claim that the record remains riddled with inconsistencies surrounding the purpose and the actual workings of

[11] Because of the proprietary nature of the evidence cited by the petitioners, *see* the petitioners' case brief dated May 5, 2014, at page 38 for a description of this evidence.

Tension's rebate scheme and that confusion persists even after four supplemental questionnaires and a series of requests for information at verification. The petitioners allege that Tension intentionally withheld or delayed providing relevant information, made contradictory statements, and even provided what appear to be falsified documents. The petitioners conclude that, due to Tension's failure to cooperate, the Department should determine as adverse facts available that Tension's rebates are not legitimate and that its claimed price adjustments should not be allowed.

Tension argues that the Department should continue to accept the rebates Tension reported for its Canadian and U.S. sales as price adjustments, and treat these rebates as price adjustments in the final margin calculation. Tension claims that its reported rebates are duly attributable to Tension's sales of OCTG to Canada and the United States.

Tension contends that even though it does not enter into a written rebate agreement with its Canadian or U.S. customers, this does not undermine the legitimacy of the rebate practice that Tension actually engaged in with its customers. According to Tension, the record demonstrates that some (but not all) of the sales contracts that Tension had with its Canadian and U.S. customers for POI sales of OCTG contained a rebate clause. Moreover, Tension claims that the record establishes that for all reported rebates, Tension had a Price Rebate Statement countersigned by its customers to confirm the amount of rebates being granted, the product items, and the sales contracts and invoices associated with such rebates. Thus, Tension asserts that it properly and correctly reflected the rebates granted for OCTG in its sales databases and that the Department verified these rebates without discrepancies.

In addition, Tension argues, the record shows that the rebates it granted to its Canadian and U.S. customers were conditioned on the "Retroactive Price Decline" rebates, if any, granted by Company A to Tension. Tension claims that the fact that Tension received "Retroactive Price Decline" rebates from Company A for hot-rolled steel coils purchased for production of OCTG supports the fact that Tension passed such rebates onto its customers and reported them as price adjustments which are attributable to OCTG. Tension alleges that the Department noted that Tension's customers knew at the time of sale that the OCTG will be manufactured using hot-rolled steel coil supplied by Company A. In addition, Tension contends that it honored its promise by granting rebates to its customers for OCTG sales when it received rebates from Company A for coils purchased for OCTG production. Thus, Tension concludes, the record already established that there was a link between the rebates Tension granted to its customers for OCTG sales and the rebates Tension received from Company A for hot-rolled steel coil of API grade. As a result, Tension contends, the petitioners' assertion that Tension's rebate is a "non-commercial gift" that is not attributable to Tension's sales of OCTG is contrary to the record and should be rejected.

Tension argues that the petitioners' assertion that the terms and conditions of Tension's rebates to its customers are not reflected in its sales documents flatly ignores the record evidence and is inconsistent with the Department's findings at sales verification. Tension contends that the fact that no written rebate agreement was made separate from the sales contract or no rebate clause was contained in some sales contracts does not preclude the Department's acceptance of the rebate practice Tension actually engaged in with its customers during the POI. Moreover, Tension asserts that the fact that some pre-POI sales contracts specified that no rebate would be granted to the customers even if Company A granted a rebate to Tension Steel strengthens the fact that there indeed was a rebate practice between Tension Steel and its customers. According to Tension, if there weren't such a practice, then there would be no need for the pre-POI sales contracts to contain a "no-rebate" clause.

Tension further contends that its use of rebates as an incentive to promote sales is consistent with business reality and makes commercial sense. Tension asserts that passing on such extra profit to its customers in exchange for the customers' continued purchases is a practice that a profit-oriented commercial entity like Tension would engage in.

Finally, Tension argues that the Department should not apply partial facts available to Tension's rebates. Tension asserts that it has been consistently cooperative and forthcoming about its rebate activities, both in its questionnaire responses and at on-site verification and that Tension's reported rebate information was complete, accurate, and ultimately verified by the Department.

Because of the proprietary nature of Tension's comments, *see* the Proprietary Issues Memorandum for further description of the remainder of Tension's arguments.

Department's Position: We find that we should reject certain, though not all, rebates reported by Tension.

Section 773(a)(1)(B)(i) of the Act directs that the Department, in calculating NV, shall use "the price at which the foreign like product is first sold ... for consumption in the exporting country." Section 772(a) of the Act defines "export price" as "the price at which the merchandise is first sold…." The Department's regulations at 19 CFR 351.401(c) explain that the price used for NV or EP will be "a price that is net of any price adjustment, as defined in § 351.102(b), that is reasonably attributable to the subject merchandise or the foreign like product." A price adjustment, in turn, is defined in 19 CFR 351.102(b) as "any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates, and post-sale price adjustments that are reflected in the purchaser's net outlay." Further, the Department's regulations make clear that the party seeking an adjustment, such as a rebate, has the burden of proving that it is entitled to that adjustment. The regulations at 19 CFR 351.401(b)(l) state that "{t}he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment."

Although the term "rebate" is not specifically defined in the regulations, the Department developed a practice for determining the legitimacy of a claimed rebate price adjustment.[12] The Department stated that it is our "practice to adjust normal value to account for rebates when the terms and conditions of the rebate are known to the customer prior to the sale and the claimed rebates are customer-specific."[13] While the Department's regulations provide for post-sale price

[12] *See Canned Pineapple Fruit from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 70948 (December 7, 2006) (*Pineapple*), and accompanying Issues and Decision Memorandum at Comment 1; *see also* 19 CFR 351.401(b)(l).
[13] *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results Of Antidumping Duty Administrative Reviews*, 71 FR 40064 (July 14, 2006) (*AFBs 16*), and accompanying Issues

adjustments that are reasonably attributable to the subject merchandise, the *Preamble* to the regulations indicates that exporters or producers should not be allowed "to eliminate dumping margins by providing price adjustments 'after the fact.'"[14] Thus, the Department stated "where a price adjustment made after the fact lowers a respondent's dumping margin, the Department will closely examine the circumstances surrounding the adjustment to determine whether it was a legitimate adjustment that was made in the ordinary course of business."[15] Further, the CIT upheld the Department's authority to reject price adjustments "that present the potential for price manipulation..."[16]

We recognize that the CIT's recent decision in *Papierfabrik August Koehler AG v. United States*, Slip Op. 14-31 (March 25, 2014) (*Koehler*), stated that the Department is required under its regulations to accept "any price adjustment" that is reasonably attributable to the foreign like product, without judging whether the adjustment is a legitimate one or not. However, this decision is not final. Further, we note that *Koehler* conflicts with other CIT decisions that affirmed the Department's decisions to reject claims for certain price adjustments.[17] In fact, the Department regularly examines the legitimacy or commercial reasonableness of transactions and claimed adjustments during its proceedings. For example, in new shipper reviews, the Department examines whether the sale forming the basis for the new shipper request is a *bona fide* commercial transaction, and this practice has been affirmed by the courts.[18] Even in administrative reviews, where the statute clearly states that the Department "shall determine" the dumping margin for "each" entry, the CIT stated: "Although the term 'each entry' seems all-inclusive, this court has recognized that it does not 'compel inclusion of all sales, no matter how distorting or unrepresentative.'"[19] Likewise, the phrase in our regulations – "will use a price that is net of any price adjustment" – does not compel inclusion of all price adjustments, including those that are not known at the time of sale and therefore are not legitimate.

We determine that only those rebates which Tension granted for sales made pursuant to sales contracts that specifically included a rebate clause were contemplated at the time of sale. Thus, only if a sales contract includes a rebate clause are "the terms and conditions of the rebate are known to the customer prior to the sale," consistent with *AFBs 16*. Only these rebates are legitimate rebates (*i.e.*, price adjustments) within the meaning of the Department's regulations.

With respect to the petitioners' argument that Tension's responses on the rebate issue warrant adverse facts available, we disagree. Contrary to the petitioners' arguments, Tension neither

---

and Decision Memorandum at Comment 19.

[14] *See Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296, 27344 (May 19, 1997) (*Preamb1e*).

[15] *See Pineapple*, and accompanying Issues and Decision Memorandum at Comment 1; *see also Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews*, 61 FR 13815, 13823 (March 28, 1996) (noting, with respect to price adjustments by way of rebates, that the "purpose of requiring respondent to prove that the buyer was aware of the conditions to be fulfilled and the approximate amount of the rebates at the time of sale is to protect against manipulation of the dumping margins by a respondent once it learns that certain sales will be subject to review").

[16] *See Koenig & Bauer-Albert AG v. United States*, 15 F. Supp. 2d 834, 840 (CIT 1998).

[17] *Id.*; *Nachi-Fujikoshi Corp. v. United States*, 890 F. Supp. 2d 1106 (1995).

[18] *See Hebei New Donghua Amino Acid Co. v. United States*, 374 F. Supp. 2d 1333 (CIT 2005).

[19] *Id.* at 1337 (citing *American Permac v. United States*, 783 F. Supp. 1421, 1424 (CIT 1992)).

withheld information nor significantly impeded the proceeding. Nor has it failed to cooperate by not acting to the best of its abilities.

Because of the proprietary nature of this issue, *see* the Proprietary Issues Memorandum for a complete discussion of this issue.

Date of Sale

Comment 4: The petitioners argue that the Department normally uses the invoice date as the date of sale unless it is satisfied that a different date better reflects the date on which the exporter establishes the material terms of sale. The petitioners assert that CHS explained that changes could be made after the initial sales contract and that, in such situations, it would issue the commercial invoice based on the revised terms agreed by both parties. The petitioners contend that at the sales verification, the Department verified that payment through a letter of credit is received prior to shipment and thus, there are no material changes to the sales terms at the time of shipment. According to the petitioners, CHS documented no changes occurring at the time of shipment for its Canadian sales. The petitioners argue that the Department should not deviate from its normal policy of using the invoice date as the date of sale because CHS claims it was possible for the sale terms to change before the shipment date.

The petitioners contend that it is possible that the two parties could change the terms of sale after the date of shipment or even after the petition is filed. The petitioners argue that, as there is no indication that the terms of sale were altered after the date of shipment in this case, the Department should follow its normal methodology of using the invoice date as the date of sale.

Because of the proprietary nature of the petitioners' comments, *see* the Proprietary Issues Memorandum for further description of the petitioners' arguments.

Citing *Solid Urea from Russia*,[20] CHS responds to the petitioners' argument stating that it is the Department's long-established practice not to consider dates subsequent to the date of shipment from the factory as appropriate for the date of sale, because once merchandise has been shipped the material terms of sale are established.

Citing the Department's sales verification report,[21] CHS argues that the Department verified that the date of sale was correctly reported as shipment date because the merchandise is shipped prior to CHS issuing the invoice and thus, the date of sale should be shipment date per the Department's normal practice.

See the Proprietary Issues Memorandum for a complete description of CHS's arguments.

[20] *See Solid Urea from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 75 FR 51440 (August 20, 2010) (*Solid Urea from Russia*), and accompanying Issues and Decision Memorandum at Comment 3.
[21] *See* sales verification report entitled, "*Verification of Third-Country and U.S. Sales of Chung Hung Steel Corp. in the Antidumping Duty Investigation of Certain Oil Country Tubular Goods from Taiwan*" dated March 31, 2014 (*CHS Sales Verification Report*).

<u>Department's Position</u>: We find that the date of shipment is the appropriate date of sale for CHS.

The regulation at 19 CFR 351.401(i) states that in identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice as recorded in the exporter's or producer's records kept in the ordinary course of business. The Secretary may use a date other than the date of invoice, however, 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.[22]

The *Preamble* to the Department's regulations also discusses the matter of identifying the dale of sale of the subject merchandise and foreign like product. Specifically, the *Preamble* states that, "…absent satisfactory evidence that the terms of sale were finally established on a different date, the Department will presume that the date of sale is the date of invoice."[23] The *Preamble* discusses that, in some cases, it may be inappropriate to rely on the date of invoice as the date of sale. For example, the *Preamble* states that the evidence on the record may indicate that, for a particular respondent, the material terms of sale may be established on some date other than the date of invoice.[24]

Although the Department normally uses the date of invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale, as outlined above, the Department's regulations and the *Preamble* provide that the Department 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 (*e.g.*, price and quantity).[25]

Evidence on the record indicates that CHS reported that all of its U.S. and comparison-market sales were produced to order pursuant to sales contracts between CHS and the customer. In response to our initial and supplemental questionnaires, CHS asserted that changes could be made to the terms of sales, such as price, ordered quantities, payment terms, and delivery terms before shipment due to the customers' request or CHS's production situation.[26] Further, CHS contended that in such circumstances, no revised sales contract needs to be made, and upon shipment, it issues the commercial invoice based on the revised terms of sales agreed by both parties.[27] In addition, CHS provided evidence that demonstrated that changes were made to the material terms of sale between the date of the sales contract and the date of shipment.[28] As such, CHS reported shipment date as the date of sale for reporting purposes. During our sales verification, we verified whether the reported shipment date is the appropriate date of sale in this case. We stated the following in the sales verification report:

[22] *See* 19 CFR 351.401(i).
[23] *See Antidumping Duties; Countervailing Duties: Final Rule,* 62 FR 27295, 27349 (May 19, 1997) (*Preamble*).
[24] *Id*.
[25] *See* 19 CFR 351.401(i); *see also Allied Tube and Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090-92 (CIT 2001); and *Yieh Phui Enterprise Co. v. United States,* 791 F. Supp. 2d 1319 (CIT 2011) (affirming that the Department may use invoice date unless a party demonstrates that the material terms of its sale were established on another date).
[26] *See* CHS's section A questionnaire response at A-15-A-17.
[27] *Id*.
[28] *See* CHS's supplemental response dated November 22, 2013, at 13 and Exhibit SE-19.

> CHS reported date of shipment as date of sale because shipment occurs before invoice. Company officials explained to us that payment (by letter of credit) usually occurs a few days to one week prior to shipment. Company officials explained to us that the terms of the letters of credit were "sight" but with the provision that it had to be accompanied by the bill of lading. While examining the company's books and records we did not see any indication that another date would be more appropriate as date of sale, confirming their narrative response.[29]

As the verified information on the record indicates that CHS's reported Canadian and U.S. sales had shipment dates that precede the date of invoice, we continue to find that the date of shipment is the appropriate date of sale for CHS's reported Canadian and U.S. sales in accordance with our normal practice[30] and thus we used the date of shipment as the date of sale for the final results.

See the Proprietary Issues Memorandum for further discussion of this issue.

Treatment of Non-Prime Pipe

Comment 5: The petitioners argue that the Department properly disallowed CHS's adjustment for non-prime pipe in the preliminary determination by ignoring the field "Adjustment due to Non-Prime Pipes" in the cost of production database. The petitioners assert that in claiming this adjustment, CHS incorrectly relies on the Court of Appeals for the Federal Circuit's (CAFC) decision in *IPSCO*.[31] The petitioners argue that *IPSCO* only applies to the treatment of co-products, whereas CHS's non-prime pipe is a by-product. The petitioners contend that if we continue to deny the adjustment, the Department should deny any additional credit for the value of CHS's non-prime pipe, because the normal records offset already has been included by CHS.

CHS argues that production costs should be allocated equally over prime and non-prime pipe. CHS argues that allocating actual costs to both prime and non-prime products accurately reflects actual production costs and conforms to the antidumping statute. Citing to *IPSCO*, CHS states that case law and the Department's own precedent demand such treatment. CHS notes that the CAFC held in *IPSCO*, a case also involving OCTG, that "the statute expressly covers actual production costs ...{and} the broad language of section 1677b(e) does not at any point expressly authorize adjustment of these production costs to account for products of a lower grade or less value."[32]

CHS also cites the following from *IPSCO*: "ITA {the International Trade Administration} counted the actual cost of materials, fabrication, and overhead ... Because the same manufacturing lot produced both grades of pipe, ITA allocated production costs equally .... In sum, ITA calculated constructed value {and cost of production} precisely as the statute directs. Because *IPSCO* {the OCTG producer} expended the same materials, capital, labor, and overhead

[29] *See CHS Sales Verification Report* at 5.
[30] *See, e.g., Certain Polyester Staple Fiber from the Republic of Korea: Preliminary Results of the 2007/2008 Antidumping Duty Administrative Review*, 74 FR 27281, 27283 (June 9, 2009), unchanged in *Certain Polyester Staple Fiber from the Republic of Korea: Final Results of the 2007-2008 Antidumping Duty Administrative Review*, 74 FR 65517 (December 10, 2009).
[31] *See IPSCO v United States*, 965 F. 2d 1056, 1059-1061 (Fed. Cir. 1992) ("*IPSCO*").
[32] *Id.*

... the constructed value {and cost of production} of one ton of limited-service pipe necessarily matched the constructed value {and cost of production} of one ton of prime pipe. ITA thus treated limited-service pipe as a co-product, not as a by-product. ...ITA computed constructed value {and cost of production} according to the unambiguous terms of {the statute} Title 19.4."[33]

CHS argues further that in *IPSCO* the CAFC found that calculating production costs based on prices is premised on "an unreasonable circular methodology ... The selling price of pipe became a basis for measuring the fairness of the selling price of pipe." CHS notes the CAFC held that such "circular reasoning contravened the express requirements of the statute which set forth the cost of production as an independent standard for fair value."[34] CHS also cites to the CIT decision in the second remand determination of the *Amended Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea*, 56 Fed. Reg. 25,669 (June 5, 1991) where the Department originally allocated the costs of producing off-grade product according to the film's value, but upon remand allocated the cost "based on actual production quantities, rather than accounting for value." [35]

CHS argues that its questionnaire responses and verification show that it also produces line and other pipes on the same production lines. It notes that in CHS's books and records, labor and overhead are allocated equally to pipe produced on the same production lines. It asserts that this reflects the reality that all pipe produced on these lines incur the same cost.

CHS argues that both prime OCTG and non-prime pipe undergo identical production processes and use equivalent amounts of material. The only difference it notes, is the testing results in different grades of pipe.

<u>Department's Position</u>: We find that the down-graded pipe in question should be valued at the net recovery price and not at the full cost incurred to produce the product. For the reasons discussed below, we believe that valuing the pipe at the net recovery price is consistent with Generally Accepted Accounting Principles (GAAP) and reasonably reflects the cost of producing the non-prime product.

As a preliminary matter, we disagree with the petitioners that a discussion of co-products is relevant in this case. In pipe making, there is no simultaneous production process up to a split point, so there are no co-products; rather, pipes are made sequentially on a production line and costs and production activities are generally identifiable to individual products. As the Department stated in *Circular Welded Pipe from Thailand*,[36] "Technically, the issue of whether to include the production quantity of the down-graded B and C pipe in the total production quantity of subject merchandise is not a joint product issue."

[33] *Id.*
[34] *Id.*
[35] *E. I. DuPont De Nemours & Co., Inc., et al. v. United States*, 932 F. Supp. 296 (C.I.T. 1996) (*DuPont*).
[36] *See Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review*, 77 FR 61738 (October 11, 2012) (*Circular Welded Pipe From Thailand*), and accompanying Issues and Decision Memorandum at Comment 7.

The issue here is whether the down-graded pipe can still be used in the same applications as the subject merchandise (*i.e.*, it is still OCTG).[37] The down-grading of a product from one grade to another will vary from case to case. Sometimes the down-grading is minor and the product remains within a product group, while at other times the down-graded product is so different, it no longer belongs to the same group and cannot be used for the same applications. In the latter case, the market value of the product is usually significantly impaired, often to a point where its production cost cannot be recovered. Instead of attempting to judge the relative values and qualities between grades, the Department adopted the reasonable practice of looking at whether the down-graded products can still be used in the same applications as the subject merchandise.[38]

In its normal books and records, CHS treats non-prime pipe as by-products. Specifically, down-graded non-prime pipe is valued at the monthly standard cost (based on market price) and these assigned costs are subtracted from total cost of manufacturing. Thus, the net cost of producing the down-graded non-prime products is carried by the OCTG products. CHS reported that non-prime pipes "still possess the basic property and function of commercial pipes and tubes, and are sold as such for structural applications, such as for construction uses, highway gantry," *etc.*[39] In other words, the non-prime pipe is not sold as OCTG.

Setting the cost of down-graded pipe at the net recovery price of the product is consistent with GAAP. In order to avoid the overstatement of inventory accounts on the balance sheet, GAAP does not allow companies to value products held in inventory at an amount greater than their market price. The practice is called "lower of cost or market – LCM." CHS is not allowed under GAAP to value the non-prime pipe at the cost of prime OCTG, a fact underscored by CHS's treatment its normal records, where it assigns a cost equal to the net market price. We also note that the CIT accepted the Department's valuation of by-products at the market price of an item.[40]

We disagree with CHS's reliance on *IPSCO*. In *IPSCO*, the Department first rejected the respondent's treatment of "limited service pipe" as a by-product of OCTG. That is, we rejected the respondent's method which set the cost of the limited service pipe at its sale price. Instead, we allocated costs equally to both prime OCTG and limited service pipe. In the first remand redetermination, the Department restated its reasons for treating the limited service pipe the same as prime OCTG, relying "heavily on IPSCO's treatment of limited service OCTG" as an OCTG product "in some financial statements." However, the CIT rejected both "IPSCO's by-product argument" and also directed the Department to "account for differences in value between prime and limited service OCTG." The Department complied with the CIT's direction and applied an allocation based on price. In the *IPSCO* decision, the CAFC upheld the Department's original decision to cost the limited service OCTG at the same amount as prime OCTG, citing limited service OCTG's use as OCTG, a fact distinguishable from the current case.

---

[37] *Id.*
[38] *Id.*
[39] *See* CHS's Section D response dated October 28, 2013, at page D-5.
[40] *DuPont*, 932 F. Supp. 296, 301 (C.I.T. 1996) (where the court opined that "assigning {recycled} pellets the cost of virgin chips would overstate the actual costs of PET film production.").

We also disagree with CHS's reliance on the CAFC's statement in *IPSCO* that the "the statute expressly covers actual production cost" and "does not at any point expressly authorize adjustment of these production costs to account for products of lower grade or less value."[41] Subsequent to the *IPSCO* case, section 773(f)(1)(A) was added to the statute, and expressly directs the Department to consider the normal books and records of the exporter or producer, if such records are kept in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the merchandise. Under the appropriate circumstances, assigning costs based on market value is a well-established practice in cost accounting and accepted under GAAP. It has also been accepted by the courts.[42]

Finally, we disagree with the petitioners that the reported costs excluding CHS' adjustment for down-graded non-prime pipe already account for the offset normally recorded in their records. CHS did not include in the cost buildups the normal offset for non-prime pipe, thus without adjusting for this offset, costs would be overstated.[43]

Depreciation

<u>Comment 6</u>: The petitioners argue that the depreciation expense associated with certain production lines should be included in reporting Dragon Steel Corp.'s (DSC's)[44] slab, hot-rolled band (HRB) and hot-rolled coil (HRC) costs, which in turn are used for purposes of testing the affiliated party purchases of these items. The petitioners argue that the major input rule requires the Department to value major inputs purchased from affiliated suppliers at the greater of the transfer price, the market price or the affiliated supplier's cost of production. The petitioners argue that DSC omitted certain depreciation expenses.

CHS argues that because DSC's accounting method complies with international accounting standards (IAS), the petitioners' request for an adjustment should be rejected. CHS cites IAS16, which states that "Depreciation of an asset begins when it is available for use – *i.e.*, when it is in the location and condition necessary for it to be capable of operating in the manner intended by management."

<u>Department's Position</u>: We included in the calculation of DSC's production costs the excluded depreciation expense. CHS reported that during the POI, CHS's affiliated supplier, DSC, was in the midst of the second phase of an expansion project of its integrated steel mills, and that there were slabs, HRBs and HRCs produced on these production lines. CHS reported that under Taiwanese GAAP and IAS, costs associated with these lines were capitalized until the line was operating "in the manner intended by management," which occurred in August 2013. DSC started recognizing depreciation expense and normal account treatment the following month.

While CHS appears correct in that DSC's accounting treatment complied with IAS, the task the Department is attempting to accomplish differs from that of financial statement reporting. That

---

[41] *See IPSCO*, 965 F.2d at 1059-1061.
[42] *See PSC VSMPO-AVISMA Corp. v. United States*, 688 F.3d 751 (CAFC 2012).
[43] CHS October 28, 2013 Section D Response (at D-42) and Exhibit CVE A-6 Cost Buildup CONNUM (2206060210086251010352), at 23-24, 29-30 of Commerce's Cost Verification Report.
[44] DSC is an affiliated supplier of CHS.

is, under sections 773(f)(2)-(3) of the Act, we test whether a transaction between affiliated parties is made at arm's length prices. When we use cost of production as a surrogate for market price under section 773(f)(2) of the Act or a floor under section 773(f)(3) of the Act, an accurate cost for purposes of these tests would include an amount associated with the cost of the production equipment (*i.e.*, depreciation expense) used to produce the item. While the production line may not yet have been to a level intended by management, it was fully functioning and producing quantities of slab, HRB and HRC. Section 773(f)(1)(A) of the Act directs us to follow the normal records of the producer unless such records do not reasonably reflect the cost of producing the item. A cost of production that excludes depreciation expense from the newly functional production line cannot be said to be reasonable.

Value Added Tax

Comment 7: The petitioners argue that the Department should include in the reported costs the amount of Value Added Tax (VAT) that was not refunded. The petitioners argue that there is no evidence that such VAT was refunded in subsequent periods. The petitioners argue that even if the VAT was refunded in subsequent periods, such a refund would be related to that period and not to the POI.

CHS argues that the Department should reject the petitioners' suggestion that the reported costs should be increased for VAT refunds not yet used or received during the POI. CHS argues that it correctly reported costs associated with VAT per its normal accounting records. CHS argues that it reported information about VAT and refunds in its December 11, 2013, and January 15, 2014, supplemental questionnaire responses. CHS argues that the petitioners should have raised its concerns during the proceeding and should not have waited until its briefs to make such comments. CHS notes that the petitioners failed to even raise this issue in its pre-verification comments as to what the Department should consider at verification. CHS argues that while the petitioners claim that a VAT refund applicable to the POI should not be credited it cites no authority or logic for such a denial of reality.

Department's Position: We disagree with the petitioners' argument that the Department should include in the reported costs the amount of any VAT that was not refunded. Section 773(e) of the Act provides that, for purposes of calculating constructed value, "the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition which are remitted or refunded upon exportation of the subject merchandise produced from such materials." The purpose of this provision is to ensure an appropriate comparison between export sales of subject merchandise, upon which no VAT taxes are charged, and the constructed value of that merchandise, when any VAT costs incurred in purchasing the inputs are remitted or refunded upon exportation.[45] CHS reported that a VAT of 5 percent is levied on purchases of inputs and home market sales of finished goods, while export sales are not subject to VAT. CHS further stated that during the POI, the input VAT paid on purchased inputs was largely offset by the output VAT collected from home market sales of finished goods. CHS stated that the balance is completely refunded by the tax authority.

[45] *See Oil Country Tubular Goods From Mexico: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 66 FR 15832 (March 21, 2001) (*OCTG Mexico*), and accompanying Issues and Decision Memorandum at Comment 2.

CHS pays VAT on purchases of goods and services and collects VAT on sales to its customers. While CHS does not collect VAT on export sales, it is granted a credit to offset the appropriate VAT. In *OCTG Mexico*, the Department explained that, "{e}ven if the amount 'not exacted' in a given month were to be less than the amount paid as VAT to suppliers in that month, the amounts associated with VAT paid on inputs to exported merchandise are still 'pardoned.'"[46] The Department only requires that a respondent demonstrate that it is entitled to a VAT refund on exports and can offset VAT paid on domestic market sales because there are timing differences between the purchases of raw materials and the subsequent collection of VAT from the customer. Moreover, CHS does not have a domestic market for OCTG and we are relying on Canadian sales for NV, which would also be subject to the export refund.

Certifications

Comment 8: Citing the *Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings*, 78 FR 42678 (July 17, 2013) (*Final Rule*), The petitioners argue that from the beginning of this investigation, CHS and its legal representatives subverted the Department's certification requirements. The petitioners further argue that section 782(b) of the Act requires that "{a}ny person providing factual information to the administering authority or the Commission in connection with a proceeding under this subtitle on behalf of the petitioner or any other interested party shall certify that such information is accurate and complete to the best of that person's knowledge." The petitioners assert that the Department's regulation at 19 CFR 351.303 makes clear that this includes interested parties' counsel, and requires that "{a} person must file with each submission containing factual information {a company certification} and, in addition, if the person has legal counsel or another representative, {a representative certification}."

The petitioners contend that CHS's U.S. legal counsel provided substantive legal representation throughout this proceeding without entering an appearance or certifying the accuracy of factual information placed on the record. Further, the petitioners state that neither of CHS's legal representatives filed an entry of appearance prior to submitting documents on CHS's behalf or to certify the accuracy of the factual information in those submissions. Therefore, the petitioners argue that CHS's cost and sales verification exhibits must be rejected because CHS's U.S. legal counsel without entering an appearance and without certifying the accuracy of any factual information throughout this proceeding, participated in a substantive manner in their compilation. The petitioners further argue that it is not sufficient for only one legal representative to certify the accuracy of a submission, because in a case involving foreign respondents and foreign counsel, the U.S. legal representative is the only party that the Department can truly hold accountable for violations of its regulations.

The petitioners assert that a respondent should be held responsible for its counsel's failure to properly certify factual information. The petitioners argue that because CHS's counsel effectively nullified the veracity of CHS's submissions, the Department must rely on the facts otherwise available on the record in accordance with section 776 of the Act, and apply an adverse inference in choosing from among the information on the record. The petitioners argue that the application of adverse facts available is warranted in this situation because both the U.S.

[46] *Id.*

and foreign counsel knowingly permitted this violation of the Department's rules to continue throughout the investigation. The petitioners suggest that given the absence of any verifiable cost or sales information for CHS, the Department should select as adverse facts available the margin calculated in the petition.

CHS argues that its foreign counsel, Wu & Partners, Attorneys-at-law (Wu & Partners) had the primary responsibility to prepare the questionnaire responses, including all factual information submitted. CHS argues that it believes that Department verifiers witnessed that reality at both the sales and cost verifications, as well as when CHS responded to the Department's questionnaires. CHS argues that it believes that the verification report and the verification itself evidence full and forthcoming responses, with no questions as to the accuracy and veracity of its data, its completeness, and CHS's intent to accurately report such data fully and accurately. CHS argues that the petitioners' unsupported speculation should be rejected because it lacks merit.

Citing the *Final Rule*, CHS asserts that the Department's practice has been to permit foreign attorney and non-attorney representatives to certify, recognizing that they too are subject to disciplinary sanctions. CHS contends that this is especially true where foreign counsel regularly participate in antidumping duty proceedings. According to CHS, the Department requires that only one representative certify a questionnaire response, even in cases where there are several parties (organizations, consulting or law firms) involved. CHS contends that the representative or counsel who is responsible for providing the information should be the one to certify it and that individual need not necessarily be a U.S. counsel. CHS argues that a counsel at Wu & Partners has been certifying the information provided on the record.

With regard to the petitioners' claim that the U.S. legal representative is the only party that the Department can truly hold accountable for violations of its regulations, CHS argues that the petitioners cite to no supporting legal authority for this claim. CHS argues that contrary to the petitioners' claim, it has no intent or desire to subvert any process in this investigation.

<u>Department's Position</u>: We find that the application of adverse facts available is not warranted. None of the prerequisites to adverse facts available has been met. There is no necessary information missing from the record. CHS has not withheld information, failed to provide information by the deadlines or in the form and manner requested, significantly impeded the proceeding, or provided information that did not verify. Accordingly, the use of the facts available, pursuant to section 776(a) of the Act, is not warranted. Further, CHS has not failed to cooperate by not acting to the best of its ability within the meaning of section 776(b) of the Act. Therefore, we are not relying on adverse facts available in this final determination.

With regard to the petitioners' contention that the Department should reject CHS's cost and sales verification exhibits because CHS's U.S. legal counsel had not entered an appearance, we disagree. The record indicates that Wu & Partners, CHS's representative, entered an appearance on behalf of CHS on October 23, 2013.[47]

[47] *See* the October 23, 2013, submission filed by the law firm Wu & Partners, Attorneys-at-law.

With respect to certifications, we note that this investigation is covered by *Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule*, 76 FR 7491 (February 10, 2011) (*Interim Final Rule*). The *Final Rule* cited by the petitioners is inapplicable, because the petition in this investigation was filed before August 16, 2013. The record indicates that Wu & Partners provided the proper certifications for the sales and cost verification exhibits it filed on the record on behalf of CHS.[48] In addition, the record indicates that Wu & Partners properly certified all of the factual information it filed on behalf of CHS on the record.[49] We note that Wu & Partners repeatedly certified as "counsel" rather than "representative," despite the fact that it is a foreign law firm. However, we recognize that the distinction between "counsel" (which means U.S. counsel) and "representative" was not addressed in the *Interim Final Rule* and that there was some confusion as to the distinction between these terms prior to the *Final Rule*. The *Final Rule* is very clear on this point, and we remind foreign attorneys that under the *Final Rule* (effective as to segments initiated on or after, or investigations initiated based on petitions filed on or after, August 16, 2013) that they must use the designation "representative" for certification purposes. For purposes of this investigation, however, we find that Wu & Partners provided the appropriate certifications.

With regard to the petitioners' assertion that a U.S. counsel is the only party that the Department could hold accountable for the accuracy of CHS's factual information, we disagree. In the *Regulation Strengthening Accountability of Attorneys and Non-Attorney Representatives Appearing Before the Department*, the Department stated the following:

> The rule expressly identifiers persons who may appear before the agency, including both attorneys and non-attorney representatives, and identifies possible sanctions for misconduct by such representatives. Nothing presently precludes the Department from disciplining any representatives including attorneys who appear before it. Indeed, both attorneys and non-attorneys representatives have been subject to possible discipline for years for violation of the Department's APO procedures.[50]

The Department further stated that "{T}o the extent a foreign non-attorney representative (a foreign attorney, not licensed in the United States, a U.S. possession or territory, may not appear as an attorney representative) is found to have violated the rule, he or she will be subject to the same disciplinary sanctions by the Department as U.S. non-attorney representatives."[51]

With regard to the petitioners' contention that it is not sufficient for only one legal representative to certify the accuracy of a submission, in a case involving foreign respondents and foreign counsel, we disagree. The *Interim Final Rule* provides interested parties guidance on the requirements for certifying factual information. Specifically, the *Interim Final Rule* states the following:

---

[48] *See* CHS's March 13, 2014, and March 21, 2014, submission certifying the accuracy of the verification exhibits.
[49] *See* CHS's September 18, 2013, October 28, 2013, November 22, 2013, December 9, 2013, January 15, 2014, and January 30, 2014, submissions.
[50] *See Regulation Strengthening Accountability of Attorneys and Non-Attorney Representatives Appearing Before the Department*, 78 FR 22773, 22777 (April 17, 2013).
[51] *Id*.

> {T}he Department has decided not to adopt the requirement to list in the certification other individuals with significant responsibility for preparing the submission. The Department agrees that referring to numerous other individuals in the certification may create ambiguity with respect to the primary responsibility of the person(s) officially responsible for the presentation of the factual information to certify the accuracy and completeness of the entire submission.[52]

The Department further stated:

> {R}ather, in order for a certification to be effective, there must be an individual (or a very limited number of individuals) to hold accountable for the accuracy and completeness of the entire submission. The person(s) that the submitting party has identified as accountable for the accuracy and completeness of the entire submission should complete the certification.[53]

Thus, given that Wu & Partners certified the information on the record on behalf of CHS, it properly followed the Department's requirements regarding certification of information placed on the record. As such, CHS's U.S. counsel was not required to certify the presentation of the factual information unless he or she was responsible for preparing such information. The record does not indicate that CHS's U.S. counsel was responsible for preparing any of the pertinent factual information placed on the record and therefore, its certification was not required as outlined in the *Interim Final Rule*. Nevertheless, pursuant to our request, CHS's U.S. counsel filed an entry of appearance prior to participating at the scheduled May 21, 2014 hearing.[54]

VI. RECOMMENDATION

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

✓
__________ __________
Agree Disagree

Ronald K. Lorentzen

____
Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

July 10, 2014
____
(Date)

[52] *See Interim Final Rule*, 76 FR at 7495.
[53] *Id.*
[54] *See* Memorandum to the File dated April 28, 2014, and Memorandum to the File dated May 19, 2014.