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International Trade Administration
Washington, D.C. 20230

A-423-808
Administrative Review
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December 23, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

RE: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Stainless Steel Plate in Coils from Belgium; 2011-2012

Summary

We analyzed the case brief submitted by the respondent, Aperam Stainless Belgium N.V. (ASB) and the rebuttal brief submitted by the Petitioners.[1] As a result of our analysis, we did not make changes from the *Preliminary Results* in the margin calculation.[2] We recommend that you approve the positions described in the Discussion of Interested Party Comments section, *infra*.

I. Background

On June 10, 2013, the Department of Commerce (the Department) published the *Preliminary Results* in the *Federal Register*. This review covers one producer and/or exporter of the subject merchandise: ASB. On July 10, 2013, the Department received a case brief from ASB. On July 18, 2013, the Department received a rebuttal brief from the Petitioners. Based on our analysis of the comments received, we did not make changes to the margin calculation for ASB.

[1] The Petitioners in this case are: Allegheny Ludlum Corporation, North American Stainless, United Auto Workers Local 3303, Zanesville Armco Independent Organization, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (AFL-CIO/CLC) of America, AFL-CIO/CLC (collectively, Petitioners). ASB submitted its case brief on July 10, 2013. Petitioners submitted their rebuttal briefs on July 18, 2013.

[2] *See Stainless Steel Plate in Coils From Belgium: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012,* 78 FR 34644 (June 10, 2013) *(Preliminary Results)*.

II. Scope of the Order

The product covered by this order is certain stainless steel plate in coils. Stainless steel is alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (*e.g.*, cold-rolled, polished, *etc.*) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this order are the following: (1) plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.02, 7219.12.00.06, 7219.12.00.21, 7219.12.00.26, 7219.12.00.51, 7219.12.00.56, 7219.12.00.66, 7219.12.00.71, 7219.12.00.81, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60 and 7220.90.00.80.

Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this order is dispositive.

III. Discussion of Interested Party Comments

Comment 1: Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Less-Than-Fair-Value Investigations

Case Brief Arguments of ASB

- Although the Department claimed that it lawfully withdrew 19 CFR 351.414 in 2008,[3] the Court of International Trade (CIT or the Court) found the Department's revocation of 19 CFR 351.414 invalid and, therefore, the regulation remains in force.[4]
- The Department must still abide by 19 CFR 351.414. In particular, in the *Preliminary Results*, the Department applied, as an alternative comparison method, the average-to-transaction (A-to-T) comparison method to all U.S. sales, which 19 CFR 351.414 explicitly forbids.

Rebuttal Brief Arguments of Petitioners

- As opposed to ASB's interpretation, 19 CFR 351.414(f) (1999) refers to antidumping investigations, not administrative reviews, and, thus, is not applicable to the instant administrative review.[5]

[3] *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations,* 73 FR 74930 (December 10, 2008) (*2008 Withdrawal*).
[4] *See Gold East Paper (Jiangsu) Co. v. United States*, 918 F. Supp. 2d 1317 (CIT 2013) (*Gold East Paper*).

- The *2008 Withdrawal* only addressed antidumping investigations.
- ASB's reliance on the 1946 Administrative Procedure Act[6] and *Gold East Paper*, where the CIT focused on the *2008 Withdrawal* and in particular 19 CFR 351.414(f)(2) (the "Limiting Rule"), is without merit. This judicial proceeding is not final and conclusive, and it deals with an antidumping investigation and not an administrative review.
- The *2008 Withdrawal* did not withdraw 19 CFR 351.414 in its entirety, but instead withdrew only 19 CFR 351.414(f) (1999) and two other, related provisions from the *1997 Rule*,[7] 19 CFR 351.414(g) (1999) (concerning requests by the Department in an investigation for analysis of possible targeted dumping) and 19 CFR 351.301(d)(5) (1999) (concerning setting the deadline of an antidumping investigation for petitioners to allege targeted dumping).
- The Department subsequently issued a Final Rule in 2012[8] which modifies 19 CFR 351.414 and applies to all preliminary determinations in administrative reviews issued on or after April 16, 2012.

Department's Position:

The Department disagrees with ASB's claim that 19 CFR 351.414 (1999)[9] remains in effect, thereby limiting the application of the A-to-T comparison method. The *2008 Withdrawal* involved a regulation which only applied in less-than-fair-value investigations and not in administrative reviews. Likewise, the *Gold East Paper* judicial proceeding involves a less-than-fair-value investigation and not a review. Furthermore, the Department's promulgation of a revised regulation, 19 CFR 351.414, specifically dealt with filling the gap in the statutory language regarding the selection of an appropriate comparison method in the context of administrative reviews. This process was done with proper notice and opportunity to comment, and no party could reasonably have been left with the impression that the Department would be bound by the withdrawn targeted dumping regulations in administrative reviews.

Assuming, *arguendo*, that this was a less-than-fair-value investigation, the Department would still disagree with ASB that the *2008 Withdraw* was improper. While the CIT held that the issuance of the Department's interim final rule withdrawing the targeted dumping regulation was defective,[10] the Court's ruling is not final and conclusive as that matter is still in litigation. Moreover, the targeted dumping regulation was properly withdrawn pursuant to the Administrative Producer Act (APA). During the withdrawal process, the Department engaged the public to participate in its rulemaking process. In fact, the Department's withdrawal of its regulations in December 2008 came after two rounds of soliciting public comments on the appropriate targeted dumping analysis. The Department solicited the first round of comments in October 2007, more than one year before it withdrew the regulation by posting a notice in the *Federal Register* seeking public comments on what guidelines, thresholds, and tests it should use

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[5] *See* Petitioners' Rebuttal Brief at pages 3-4.
[6] Petitioners also relied on Attorney General's Manual on the Administrative Procedure Act dated June 11, 1947.
[7] *See Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296 (May 19, 1997) (*1997 Rule*).
[8] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).
[9] The Department notes that the *2008 Withdrawal* only applied to 19 CFR 351.301(d)(5), 351.414(f), 351.414(g).
[10] *See Gold East Paper*, 918 F. Supp. 2d at 1327-28.

in conducting an analysis under section 777A(d)(1)(B) of the Tariff Act of 1930 as amended (the Act).[11] As the notice explained, because the Department had received very few targeted dumping allegations under the regulations then in effect, it solicited comments from the public to determine how best to implement the remedy provided under the statute to address masked dumping. The notice posed specific questions, and allowed the public 30 days to submit comments.[12] Various parties submitted comments in response to the Department's request.[13] ASB provide no comments in response to the Department's request.[14]

After considering those comments, the Department published a proposed new methodology in May 2008 and again requested public comment.[15] Among other things, the Department specifically sought comments "on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping."[16] Several of the submissions[17] received from parties explained that the Department's proposed methodology was inconsistent with the statute and should not be adopted.[18] Moreover, several entities explicitly stated that the Department should not establish minimum thresholds for accepting allegations of targeted dumping because the statute contains no such requirements.[19] Once again, ASB did not comment on the Department's proposed methodology.[20]

These comments suggested that the regulation was impeding the development of an effective remedy for masked dumping. Indeed, after considering the parties' comments the Department explained that because "the provisions were promulgated without the benefit of any experience on the issue of targeted dumping, the Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."[21] For this reason, the Department determined that the regulation had to be withdrawn.[22] Although this withdrawal was effective immediately, the Department again invited parties to submit comments, and gave them a full 30 days to do so.[23] The comment period ended on January 9, 2009, with

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[11] *See Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 FR 60651 (October 25, 2007).
[12] *Id.*
[13] *See Public Comments Received December 10, 2007*, Department of Commerce, http://ia.ita.doc.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html (Dec. 10, 2007) (listing the entities that commented).
[14] *Id.*
[15] *See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 FR 26371, 26372 (May 9, 2008).
[16] *Id.*
[17] The public comments received June 23, 2008 and submitted on behalf of several domestic parties can be accessed at: http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html.
[18] *See, e.g.*, "Comments on Targeted Dumping Methodology, Comments," (Interested Party Comments) dated June 23, 2008, at 2.
[19] *See, e.g.*, letter from Committee to Support U.S. Trade Laws, to the Department: "Comments on Targeted Dumping Methodology" at 25; *see also* Interested Party Comments at 29.
[20] *See* Public Comments received June 23, 2008, available at http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html (June 23, 2008) (listing the entities that commented)
[21] *See 2008 Withdrawal.*
[22] *Id.*
[23] *Id.*

several parties submitting comments.[24] As before, ASB failed to participate and did not submit comments in response to the Department's request.[25]

The course of the Department's decision-making demonstrates that it sought to actively engage the public. This type of public participation is fully consistent with the APA's notice-and-comment requirement.[26] Moreover, various courts have rejected the idea that an agency must give the parties an opportunity to comment before every step of regulatory development.[27] Rather, where the public is given the opportunity to comment meaningfully consistent with the statute, the APA's requirements are satisfied. The touchstone of any APA analysis is whether the agency, as a whole, acted in a way that is consistent with the statute's purpose.[28] Here, similar to the agency in *Mineta*, the Department provided the parties more than one opportunity to submit comments before issuing the final rule. As in *Mineta*, the Department also considered the comments submitted and based its final decision, at least in part, upon those comments. Just as the court in *Mineta* found all of those facts to indicate that the agency's actions were consistent with the APA, so too the Department's actions here demonstrate that it fulfilled the notice and comment requirements of the APA.

The APA does not require that a final rule that the agency promulgates must be identical to the rule that it proposed and upon which it solicited comments.[29] Here, the Department actively engaged the public in its rulemaking process; it solicited comments and considered the submissions it received. In fact, that the numerous comments prompted the Department to withdraw the regulation demonstrates that the Department provided the public with an adequate opportunity to participate. In doing so, the Department fully complied with the APA.

Further, even if the two rounds of comments that the Department solicited before the withdrawal of the regulation were insufficient to satisfy the APA's requirements, the Department properly declined to solicit further comments pursuant to the APA's "good cause" exception. This exception provides that an agency is not required to engage in notice and comment if it determines that doing so would be "impracticable, unnecessary, or contrary to the public interest."[30] The Court of Appeals for the Federal Circuit (CAFC) recognized that this exception can relieve an agency from issuing notice and soliciting comment where doing so would delay the relief that Congress intended to provide.[31] In *National Customs Brokers*, the CAFC rejected a plaintiff's argument that the U.S. Customs Service failed to follow properly the APA in promulgating certain interim regulations when it had published these regulations without giving

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[24] *See Public Comments Received January 23, 2009*, Department of Commerce, (Jan. 23, 2009).
[25] *Id.*
[26] *See, e.g., Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000) (holding that the EPA's decision to not implement a rule upon which it had sought comments did not violate the APA's notice and comment requirements because the parties should have understood that the agency was in the process of deciding what rule would be proper).
[27] *See Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (*Mineta*) (holding that the Department of Transportation's promulgation of four rules, each with immediate effect, only after the issuance of which the public was given the opportunity to comment, afforded proper notice and comment).
[28] *Id.*
[29] *See, e.g., First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).
[30] *See* 5 USC 553(b)(B).
[31] *See, e.g., National Customs Brokers and Forwarders Ass'n of Am., Inc. v. United States*, 59 F.3d 1219, 1223 (Fed. Cir. 1995).

the parties a prior opportunity to comment. Moreover, although the U.S. Customs Service solicited comments on the published regulations, it stated that it "would not consider substantive comments until after it implemented the regulations and reviewed the comments in light of experience" administering those regulations.[32] The U.S. Customs Service explained that "good cause" existed to comply with the APA's usual notice and comment requirements because the new requirements did not impose new obligations on parties, and emphasized its belief that the regulations should "become effective as soon as possible" so that the public could benefit from "the relief that Congress intended."[33] The Court recognized that this explanation was a proper invocation of the "good cause" exception and explained that soliciting and considering comments was *both* unnecessary (because Congress had passed a statute that superseded the regulation) "*and* contrary to the public interest because the public would benefit from the amended regulations."[34] For this reason, the Court affirmed the regulation against the plaintiff's challenge.[35]

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

Comment 2: Use of the Average-to-Average Comparison Method in Administrative Reviews

Case Brief Arguments of ASB

- The Department's use of average-to-average (A-to-A) comparison method in administrative reviews is inconsistent with section 777A(d) of the Act, and thus, "violates the 1st prong of the Chevron test."
- The Department must determine an export price (EP) or constructed export price (CEP), and subsequently a dumping margin, for each entry of subject merchandise in accordance with section 751(a)(2)(A) of the Act.
- The Statement of Administrative Action (SAA) confirms congressional intent that the A-to-A or transaction-to-transaction (T-to-T) comparison methods be limited to investigations, and that the A-to-T comparison method be the preferred comparison method in administrative reviews.
- Section 777A(a)(1) of the Act, "in general" sets forth criteria which the Department failed to address in order to apply the other provisions of section 777A, including the application of the A-to-A comparison method in administrative reviews.
- Congress had an explicit idea of what it intended and did not speak with silence, such that the Department cannot use the A-to-A comparison method in administrative reviews.

[32] *Id.*, at 1220–21.
[33] *Id.*, 59 F.3d at 1223.
[34] *Id.*, at 1224 (emphasis).
[35] *Id.*

Rebuttal Brief Arguments of Petitioners

- The Department should apply the A-to-T comparison method in administrative reviews, preferably with assessments being implemented using a "master list." However, as long as the A-to-A comparison method is employed by the Department in administrative reviews, it is necessary that the Department correct "for those instances in which dumping can be masked by that very methodology

Department's Position:

The Department disagrees with ASB. Section 771(35)(A) of Act defines "dumping margin" as the "amount by which the normal value (NV) exceeds the EP or CEP of the subject merchandise." The definition of "dumping margin" calls for a comparison of NV and EP or CEP. Before making the comparison called for, it is necessary to determine how to make the comparison.

ASB posits that the Department has no statutory authority to consider the application of the A-to-A comparison method in administrative reviews. ASB states that Congress made no provision for the Department to apply the A-to-A comparison method in section 777A(d)(2) of the Act. Indeed, section 777A(d)(1) of the Act applies to "Investigations" and section 777A(d)(2) of the Act applies to "Reviews." Section 777A(d)(1) of the Act discusses, for investigations, the standard comparison methods (*i.e.*, A-to-A and T-to-T) and then provides for an alternative comparison method (*i.e.*, A-to-T) that is an exception to the standard methods when certain criteria are met. Section 777A(d)(2) of the Act discusses, for reviews, the maximum length of time over which the Department may calculate weighted-average NV in administrative reviews. Section 777A(d)(2) of the Act has no provision for the comparison method to be employed in administrative reviews. Therefore, to follow ASB's logic, the statute makes no provision for comparison methods in administrative reviews at all. Such a conclusion would infer that Congress did not intend that Department ever make a comparison of NVs and EPs or CEPs in order to calculate a dumping margin as described in section 771(35)(A) of the Act.

To fill this gap in the statute, the Department has promulgated regulations to specify how comparisons between NV and EP or CEP would be made in administrative reviews. With the implementation of the Uruguay Round Agreements Act (URAA), the Department promulgated the 1997, in which 19 CFR 351.414(c)(2) stated that the Department would normally use the A-to-T comparison method in administrative reviews. In 2010, the Department published its *Proposed Modification for Reviews*[36] pursuant to section 123(g)(1) of the Uruguay Round Agreements Act (URAA). This proposal was in reaction to several WTO Dispute Settlement Body panel reports which had found that the denial of offsets for non-dumped sales in administrative reviews to be inconsistent with the WTO obligations of the United States. When considering the proposed revisions to 19 CFR 351.414, the Department gave proper notice and opportunity to comment to all interested parties. Pursuant to section 123(g)(1)(D) of the URAA, in September 2011, the U.S. Trade Representative (USTR) submitted a report to the House Ways

[36] *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Proposed Rule; Proposed Modification; Request for Comment*, 75 FR 81533 (December 28, 2010) (*Proposed Modification for Reviews*).

and Means and Senate Finance Committees which described the proposed modifications, the reasons for the modifications, and a summary of the advice which the USTR had sought and obtained from relevant private sector advisory committees pursuant to section 123(g)(1)(B) of the URAA. Also in September 2011, pursuant to section 123(g)(1)(E) of the URAA, the USTR, working with the Department, began consultations with both congressional committees concerning the proposed contents of the final rule and the final modification. As a result of this process, the Department published the *Final Modification for Reviews*.[37] These revisions were effective for all preliminary results of review issued after April 16, 2012, as is the situation for this administrative review.

19 CFR 351.414 (b) (2012) describes the methods by which NV may be compared to EP or CEP in antidumping investigations and administrative reviews (*i.e.*, A-to-A, T-to-T, and A-to-T). These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons, a comparison is made for each group of comparable export transactions for which the EPs, or CEPs, have been averaged together (*i.e.*, for an averaging group[38]). The Department does not interpret the Act or the SAA to prohibit the use of the A-to-A comparison method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T comparison method in administrative reviews. 19 CFR 351.414(c)(1) (2012) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department determined that in both antidumping investigations and administrative reviews, the A-to-A method will be used "unless the Secretary determines another method is appropriate in a particular case."

The Department further disagrees with ASB's contention that section 751(a)(2)(A) of the Act precludes the use of the A-to-A comparison method in administrative reviews. Section 777A(d) of the Act provides for three distinct comparison methods by which dumping margins may be calculated. Section 751(a)(2) of the Act, in contrast, makes no reference to a specific comparison method to be used in administrative reviews. Accordingly, the Department considers that any of the three comparison methods satisfies the requirements of section 751(a)(2) of the Act. Moreover, section 751(a)(2) of the Act makes no reference to either the weighted-average dumping margin or the importer-specific antidumping duty assessment rate. These particular results of review are not specifically mandated by section 751(a)(2) of the Act, but instead are features of the Department's long-standing practice in administrative reviews. Both the weighted-average dumping margin and the importer-specific antidumping duty assessment rate are the result of aggregating the comparison results obtained using one of the three comparison methods. While the calculation of these results depends on transaction-specific data, and these results are the basis for establishing cash deposit requirements at the time of entry and antidumping duty assessments at the time of liquidation, they do not involve entry-by-entry comparisons of NV with EP or CEP. The courts affirmed these features of the Department's

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[37] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

[38] *See* 19 CFR 351.414(d)(2).

practice, confirming that section 751(a)(2) does not mandate an entry-by-entry determination of dumping and antidumping duties.[39]

The Department does not interpret section 777A(a)(1) of the Act to set forth a general rule that governs the other subsections of section 777A. For example, section 777A(a)(1) of the Act addressing the use of averaging and statistically valid samples refers to the authority to use averages and samples where there is a significant volume of sales or a significant number or types of products. This is separate from the authority under section 777A(c)(1) of the Act, for example, that provides an exception based upon whether it is impracticable to make individual weighted-average dumping margin determinations due to the large number of exporters or producers involved in an investigation or administrative review. Under a plain reading of section 777A(c)(1) of the Act, the large number of exporters or producers alone is sufficient to permit the Department to limit its examination under the express exceptions. Moreover, ASB's argument that averaging is not permissible unless the condition of section 777A(a)(1) of the Act is met, would read out of the statute those references to averaging that are otherwise directed or mandated under the statute under subsection (d)(1) and (2). Thus, the Department does not interpret section 777A(a) of the Act to set forth a general rule for the other subsections within section 777A as ASB asserts.

The silence of the statute with regard to application of the A-to-A comparison method in administrative reviews does not preclude the Department from applying such a practice in administrative reviews. Indeed, the CAFC stated that the "court must, as we do, defer to Commerce's reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency's generally conferred authority and other statutory circumstances."[40] Further, the court stated that this "silence has been interpreted as 'an invitation' for an agency administering unfair trade law to 'perform its duties in the way it believes most suitable' and courts will uphold these decisions '{s}o long as the {agency}'s analysis does not violate any statute and is not otherwise arbitrary and capricious."[41] The Department finds that its actions, as discussed above, represent a logical, reasonable and deliberative method to fill the silence in the Act with regard to administrative reviews.

With regard to the Department's use of an alternative comparison method for all sales transactions in this administrative review, when the criteria for application of the A-to-T method are satisfied, section 777A(d)(1)(B) and (d)(2) of the Act do not limit application of the A-to-T method to certain transactions. Instead, the provisions expressly permit the Department to determine dumping margins by comparing weighted-average NVs to the EPs (or CEPs) of individual transactions. Although the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the A-to-T method to all sales, such an

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[39] *See, e.g., Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir 2004), *cert. denied* 543 U.S. 976 (November 1, 2004); and *Corus Staal BV v. DOC*, 395 F.3d 1343, 1347 (Fed. Cir 2005), *cert. denied*, 126 S.Ct. 1023 (January 9, 2006).

[40] *See United States Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010).

[41] *See Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1376-77 (CIT 2010), *citing U.S. Steel Group v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

interpretation is reasonable and is more consistent with the Department's approach to the selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally

Comment 3: Use of an Alternative Comparison Method in an Administrative Review

Case Brief Arguments of ASB

- Section 777A of the Act does not permit the Department to use an alternative comparison method in administrative reviews.
- Neither does the Act create a legal vacuum providing the Department with unlimited discretion to select any comparison method which it wants in administrative reviews.

Rebuttal Brief Arguments of Petitioners

- However, as long as the A-to-A methodology is employed by the Department in administrative reviews, it is necessary that the Department correct "for those instances in which dumping can be masked by that very methodology."
- To this end, the Department application of the A-to-T method to all of ASB's U.S. sales in the Preliminary Results was justified by of the results of its differential pricing analysis.

Department's Position:

The Department disagrees with ASB that the Department does not have the statutory authority to promulgate a regulation to fill the gap in the statute regarding the selection of comparison method in administrative reviews. As discussed in response to the previous comment, the statute does not address the selection of an appropriate comparison method in administrative reviews, and the legislative history only indicates preferences. Consequently, the Department promulgated regulations[42] to establish a framework in which to determine the appropriate comparison method in administrative reviews. Under the *1997 Rule* implementing the URAA, 19 CFR 351.414(c)(2) stated that the Department normally would use the A-to-T comparison method in administrative reviews, but did not mandate this approach. In 2010, the Department published its *Proposed Modification for Reviews* pursuant to section 123(g)(1) of the URAA. As noted above, this process concluded with the *Final Modification for Reviews*, in which the Department's practice in administrative reviews would parallel the WTO-consistent methodology which the Department applies in less-than-fair-value investigations. The statute does not preclude this approach.

Pursuant to 19 CFR 351.414(c)(1) (2012), the Department calculates dumping margins by comparing weighted-average NV to weighted-average EPs or CEPs unless the Secretary determines that another method is appropriate in a particular situation. In less-than-fair-value investigations, the Department examines whether to use the A-to-T comparison method as an alternative comparison method using an analysis consistent with section 777A(d)(1)(B) of the

[42] *See*, generally, the *Final Modification for Reviews* and 19 CFR 351.414.

Act. Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of administrative reviews, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) (2012) in administrative reviews is, in fact, analogous to the issue in less-than-fair-value investigations. In less-than-fair-value investigations, the Department considered an alternative comparison method to unmask dumping consistent with section 777A(d)(1)(B) of the Act.[43] Similarly, the Department considered an alternative comparison method to unmask dumping under 19 CFR 351.414(c)(1).[44] For this administrative review, the Department continues to find the consideration of an alternative comparison method to be a reasonable extension of the statute where the statute made no provision for the Department to follow.

Similar to the response to the previous comment, the silence of the statute with regard to application of an alternative comparison method in administrative reviews does not preclude the Department from applying such a practice in administrative reviews. Indeed, the CAFC stated that the "court must, as we do, defer to Commerce's reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency's generally conferred authority and other statutory circumstances."[45] Further, the court stated that this "silence has been interpreted as 'an invitation' for an agency administering unfair trade law to 'perform its duties in the way it believes most suitable' and courts will uphold these decisions '{s}o long as the {agency}'s analysis does not violate any statute and is not otherwise arbitrary and capricious."[46] The Department finds that its actions, as discussed above, represent a logical, reasonable and deliberative method to fill the silence in the Act with regard to administrative reviews.

Comment 4: Denial of Offsets with the Average-to-Transaction Comparison Method

Case Brief Arguments of ASB

- The Department's denial of offsets for non-dumped sales in the *Preliminary Results* is unlawful.

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[43] *See, e.g., Polyethylene Retail Carrier Bags From Indonesia: Final Determination of Sales at Less Than Fair Value*, 75 FR 16431 (April 1, 2010); *Certain Stilbenic Optical Brightening Agents From Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027 (March 23, 2012); *Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013).

[44] *See, e.g., Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010–2011*, 77 FR 73415 (December 10, 2012); *Stainless Steel Plate in Coils From Belgium: Antidumping Duty Administrative Review, 2010-2011*, 77 FR 73013 (December 7, 2012); *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 65272 (October 31, 2013).

[45] *See United States Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir. 2010).

[46] *See Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1376-77 (CIT 2010), *citing U.S. Steel Group v. United States*, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

Department's Position:

The Department disagrees with ASB. The recent decision by the CAFC in *Union Steel*[47] resolved the outstanding question of whether the Department's statutory interpretation is reasonable. The CAFC affirmed the Department's explanation that it may interpret the statute to permit the denial of offsets for non-dumped sales with respect to the A-to-T comparison method in administrative reviews, while permitting the Department to grant offsets for non-dumped transactions when applying the A-to-A comparison method in investigations. The CAFC also affirmed the Department's explanation that it may interpret the same statutory provision differently because there are inherent differences between the comparison methods used in investigations and reviews.[48] Indeed, the Court noted that although the Department recently modified its practice "to allow for offsets when making A-to-A comparisons in administrative reviews . . . {t}his modification does not foreclose the possibility of using zeroing methodology when {the Department} employs a different comparison method to address masked dumping concerns."[49]

Likewise, in *United States Steel Corp.*,[50] the CAFC sustained the Department's decision to no longer apply zeroing when employing the A-to-A comparison method in investigations while recognizing the Department's intent to continue to apply zeroing in other circumstances. Specifically, the Court recognized that the Department may use zeroing when applying the A-to-T comparison method where patterns of significant price differences are found.[51]

As the CAFC affirmed, the Department may reasonably interpret section 771(35) of the Act in the context of the A-to-A comparison method to permit negative comparison results to offset or reduce the sum of the positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. In contrast, when applying the A-to-T comparison method under section 777A(d)(1)(B) of the Act, the Department determines dumping on the basis of individual U.S. sales prices. Under the A-to-T comparison method, the Department compares the EP or CEP for a particular U.S. transaction with the weighted-average NV for the comparable merchandise of the foreign like product. This comparison method yields results specific to each individual export transaction. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its weighted-average NV. The Department then aggregates the results of these comparisons (*i.e.*, the amount of dumping found for each individual U.S. sale) to calculate the numerator of the weighted-average dumping margin (*i.e.*, the total amount of dumping for the respondent). To the extent the weighted-average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific comparison results.[52] Thus,

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[47] *Union Steel v. United States*, 713 F.3d 1101 (CAFC 2013) (*Union Steel*) at *1106.
[48] *Id.*, at *1106.
[49] *Id.* at **1110 (internal citations omitted).
[50] *See United States Steel Corp. v. United States*, 621 F.3d at 1355 n.2, 1362-63 (Fed. Cir. 2010).
[51] *Id.* at 1363 ("{T}he exception contained in 1677f-1(d)(1)(B) indicates that Congress gave {the Department} a tool for combating targeted or masked dumping by allowing {the Department} to compare weighted-average normal value to individual transaction values when there is a pattern of prices that differs significantly among purchasers, regions, or periods of time.").
[52] As discussed previously, the Department does account, however, for the sale in its weighted-average dumping

when the Department focuses on transaction-specific comparison results, the Department reasonably interprets the word "exceeds" in section 771(35)(A) of the Act as including only positive comparison results in the aggregate dumping margin. Consequently, when using the A-to-T comparison method, the Department reasonably does not permit negative comparison results to offset or reduce the sum of the positive comparison results when determining the aggregate dumping margin within the meaning of section 771(35)(B) of the Act.

Comment 5: Differential Pricing Analysis

Case Brief Arguments of ASB

- The Department's differential pricing analysis violates the second step of Chevron. The results of the Department's differential pricing analysis demonstrate why the test should not be applied to ASB. Almost 100 percent of those sales for which there was sufficient data to test passed the Cohen's *d* test, although more than half of those sales were not dumped. Further, eight percent of sales that have dumping margins were found not to pass the Cohen's *d* test. Such results are clearly unreasonable.
- The differential pricing test fails to take into consideration other factors which may cause differences in prices, such as changes in raw material costs, surcharges, the price of natural gas; decline in demand; as well as differences in level of trade or circumstance of sale. Therefore, differential pricing can only be detected by comparing prices of similar products, delivered under the same conditions and at similar times.
- In particular, the differential pricing analysis in the *Preliminary Results* improperly includes alloy surcharges in the calculation of net price. The alloy surcharges are subject to considerable price fluctuation. As a result, the Cohen's *d* test cannot distinguish between dumping and fluctuations in price due only to market changes in alloy prices. Thus, for the final results the Department should remove alloy surcharge from the net price calculation.
- The differential pricing analysis from the *Preliminary Results* has several flaws that result in false positive findings of differential pricing. First, the Cohen's *d* test should only consider sales to have been differentially priced if the prices of these sales are lower than that of the comparison group. Alternatively, the Department should not consider sales to have been differentially priced if they also are not found to have been dumped.
- As an alternative, the Department should revise the price comparisons to eliminate timing differences." Specifically, the proper method is to consider only ". . . those sales that have prices lower than the comparison group" or ". . . drop those sales with no dumping from the differential pricing analysis." The Department should apply this alternative approach, given the requirements and purpose of the antidumping statute.
- Second, the Department should eliminate timing differences. Using averages over the entire period of review is not permitted by section 751(a)(2) of the Act which required to make comparisons on a transaction-specific basis. Further, section 777A(d)(2) of the Act requires when comparing EP or CEP prices of individual transactions to weighted-average NVs, "the administering authority shall limit its averaging of prices to a period

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margin calculation. The value of all non-dumped 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. Therefore, all non-dumped transactions result in a lower weighted-average dumping margin.

not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale."

- The Department found that application of the A-to-T methodology yields a meaningful difference in ASB's weighted-average dumping margin as compared with the margin that results from application of the A-to-A methodology. However, the Department failed to quantify the difference or establish that any differences could not be taken into account using the standard comparison methodology.
- Because the Department must apply the improperly withdrawn targeted dumping regulations, it cannot apply the A-to-T comparison method to all U.S. sales.

Rebuttal Brief Arguments of Petitioners

- The Department lawfully applied the A-to-T comparison method to all of ASB's U.S. sales, because its analysis revealed significant differences in prices among purchasers, regions, or periods of time.
- The Department's inclusion of alloy surcharges in net prices does not render unreasonable the differential pricing analysis employed in the *Preliminary Results*. In the final results of the 2010-2011 administrative review, the Department determined that "[t]he alloy surcharges are price adjustments that are reasonably attributable to the sale of subject merchandise" and further determined that ASB offered "no reason why the term 'export price (or constructed export price)' should mean something different in section 777A(d)(1)(B)(i) of the Act than it means everywhere else it is used in the antidumping statute." ASB presented no reason for the Department to deviate from the Department's position on this issue in the current review.
- There is no basis for ASB's claim that the Department should alter its differential pricing analysis to exclude U.S. sales with prices that are higher than the prices of the comparison group. The Department addressed this argument in the prior review.
- Furthermore, the Department's use of the Cohen's *d* test constitutes a reasonable method for measuring whether a meaningful difference exists. The Cohen's *d* test is a statistical analysis that is designed to measure the overlap that exists between two groups, and this overlap is measured in terms of standard deviation. In this regard, the Department set 0.8 standard deviations as one of its thresholds for determining whether the difference in average prices between the comparison groups is statistically significant."
- ASB's claim that the Department failed to quantify the difference in the two comparison methods is without merit. The Department stated that it considers the difference in the A-to-A and A-to-T dumping margins meaningful if there is a 25-percent relative change in the weighted-average dumping margin in the two methods where both rates are above the *de minimis* threshold or where the resulting weighted-average dumping margin moves across the *de minimis* threshold."

Department's Position:

The Department disagrees with ASB that the differential pricing analysis is unreasonable. To the contrary, and as explained in the *Preliminary Results*, the Department continues to develop its

approach pursuant to its authority to address potential masked dumping.[53] In carrying out this statutory objective, the Department determines whether "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions, or periods of time, and.... why such differences cannot be taken into account using {the A-to-A or T-to-T comparison method}"[54] With the statutory language in mind, the Department relied on the differential pricing analysis to determine whether these criteria are satisfied such that application of an alternative methodology is appropriate.[55]

ASB presents several arguments regarding the Department's differential pricing analysis in the *Preliminary Results*. As an initial matter, we note that ASB's arguments have no grounding in the language of the statute. ASB does not argue that the Department's reliance on the Cohen's *d* test violates the statutory language. Rather, ASB advocates for an alternative approach and puts forth several reasons why it believes the Department should modify its approach from the *Preliminary Results*. There is nothing, however, in the statute that mandates *how* the Department measure whether there is a pattern of EPs that differs significantly. To the contrary, carrying out the purpose of the statute here is a gap filling exercise by the Department. As explained in the *Preliminary Results* and below, the Department's differential pricing analysis is reasonable, and the use of Cohen's *d* test as a component in this analysis is in no way contrary to the law.

ASB argues that the results of the Cohen's d test, simply on its face, are unreasonable. ASB states that {a}lmost 100 percent of those sales for which there was sufficient data to test, passed the Cohen's *d* test, yet, more than half of those sales were not dumped. ASB further argues that eight percent of sales that were dumped were found *not* to pass the Cohen's *d* test. Thus, ASB argues that such results are clearly unreasonable. The Department disagrees. Section 777A(d)(1)(B)(i) of the Act requires that the Department find a "pattern of export prices (or constructed export prices) for comparable merchandise which differ significantly among purchasers, regions, or periods of time..." This provision, which the Cohen's *d* and ratio tests address, involves an analysis of U.S. prices, and makes no reference to comparisons with NVs. As explained in the *Preliminary Results*, the Cohen's *d* test is the first stage of the differential pricing analysis - the part where the Cohen's *d* coefficient is calculated to evaluate the extent to which the net prices in the U.S. market to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise. The analysis of the impact of a pattern of prices that differ significantly, if one is identified, on dumping and the potential for masked dumping is addressed by section 777A(d)(1)(B)(ii) of the Act.

The Department disagrees with ASB that it must account for some kind of causality for any observed price differences, such as changes in raw material costs, prices of natural gas, or declines in market demand.[56] No such requirement exists in the statute. Congress did not speak to the intent of the producers or exporters in setting EPs that exhibit a pattern of significant price differences. Consistent with the statute and the SAA, the Department has determined whether a

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[53] *See Preliminary Results*, and accompanying Decision Memo at 20.
[54] *See* section 777A(d)(1)(B) of the Act (emphasis added).
[55] *See* 19 CFR 351.414(c)(1).
[56] The Department notes that the other examples given by ASB as a cause of price differences, level of trade or circumstances of sale, are accounted for in the differential pricing analysis. Level of trade is a part of the definition of "comparable merchandise." Circumstances of sale are accounted for as the Department uses the adjusted U.S. price, net of all circumstance of sale adjustments, in the Cohen's *d* test.

pattern of significant price differences exists. Neither the statute nor the SAA requires the Department to conduct an additional analysis as argued by ASB to account for potential reasons that the observed price differences exist.

The Department disagrees with ASB that the Department should exclude alloy surcharges from the net price calculation while conducting the differential pricing test. The Department uses net prices in the differential pricing analysis because "export price (or constructed export price)," as that term is used in section 777A(d)(l)(B)(i) of the Act, means "a price that is net of any price adjustment . . . . that is reasonably attributable to the subject merchandise. . . ." The alloy surcharges are price adjustments that are reasonably attributable to the sale of subject merchandise. ASB offers no reason why the term "export price (or constructed export price)" should mean something different in section 777A(d)(l)(B)(i) of the Act than it means everywhere in the antidumping statute.

The Department disagrees with ASB's argument that it should alter the differential pricing analysis from the *Preliminary Results* and instead utilize an approach in which it considers only ". . . those sales that have prices *lower* than the comparison group" or ". . . drop{s} those sales with no dumping from the differential pricing analysis."[57] Contrary to ASB's assertion, the statute does not require that the Department consider only lower priced sales in the differential pricing analysis. The Department has the discretion to consider sales information on the record in its analysis and to draw reasonable inferences as to what the data show. Contrary to ASB's assertions, it is reasonable for the Department to consider both lower priced and higher priced sales in the Cohen's *d* analysis because higher priced sales are equally capable as lower priced sales to create a pattern of prices that differ significantly. Further, higher priced sales will offset lower priced sales, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, that can mask dumping. The statute states that the Department may apply the A-to-T comparison method if "there is a pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time," and the Department "explains why such differences cannot be taken into account" using the A-to-A comparison method.[58] The statute directs the Department to consider whether a pattern of prices differ significantly. The statutory language references prices that "differ" and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that the Department considers only higher priced sales or only lower priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department explained that higher priced sales and lower priced sales do not operate independently; all sales are relevant to the analysis. Higher or lower priced sales could be dumped or could be masking other dumped sales—this is immaterial in the Cohen's *d* test and the question of whether there is a pattern of EPs that differ significantly because this analysis includes no comparisons with NVs. By considering all sales, higher priced sales and lower priced sales, the Department is able to analyze an exporter's pricing practice and to identify whether there is a pattern of prices that differ significantly. Moreover, finding such a pattern of prices that differs significantly among purchasers, regions, or periods of time signals that the exporter is discriminating between purchasers, regions, or periods of time within the U.S. market, rather than following a more

[57] *See* ASB's case brief dated July 10, 2013 at page 11.
[58] *See* section 777A(d)(1)(B) of the Act.

uniform pricing behavior. Where the evidence indicates that the exporter is engaged in a discriminating pricing behavior, there is cause to continue with the analysis to determine whether masked dumping is occurring. Accordingly, both higher and lower priced sales are relevant to the Department's analysis of the exporter's pricing behavior.

The Department disagrees with ASB's assertion that either section 751(a)(2) or section 777A(d)(2) of the Act prohibits the Department from using weighted-average U.S. prices for the Cohen's *d* test. As discussed above for Comment 2, section 751(a)(2) makes no specific mandate with respect to the comparison methods set forth in section 777A(d), the calculation of weighted-average dumping margins or importer-specific antidumping duty assessment rates. Likewise, section 751(a)(2) of the Act places no particular requirements on the analysis used to assess a pattern of U.S. prices that differ significantly in section 777A(d)(1)(B)(i). Further, the Department disagrees with ASB's claim that section 777A(d)(2) of the Act forbids the Department to rely on an averaging period longer than one calendar month in an administrative review. Section 777A(d)(2) of the Act specifically refers to the averaging period for the comparison market prices on which NV is based when using the A-to-T comparison method. In the Cohen's *d* test, the analysis is of U.S. prices, not comparison market prices. Further, this provision involves the calculation of dumping margins by comparing individual EPs or CEPs to a weighted-average NV. The Department notes that in arm's-length test and the level-of-trade analysis, the Department relies on weighted-average comparison market prices which span the entire period of review. Accordingly, the Department finds ASB's arguments meritless.

Finally, we disagree with ASB that in the Preliminary Results the Department failed to quantify the difference or establish that any differences could not be taken into account using the standard comparison methodology. In the *Preliminary Results*, the Department explained that the second stage of the differential pricing analysis is, in fact, where "we examine whether using only the A-to-A method can appropriately account for such differences. In considering this question, the Department tests whether using an alternative method, based on the results of the Cohen's *d* and ratio tests described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the A-to-A method only. If the difference between the two calculations is meaningful, this demonstrates that the A-to-A method cannot account for differences such as those observed in this analysis, and therefore, an alternative method would be appropriate."[59] The Department went on to explain that a difference in the weighted-average dumping margins is considered meaningful if there is a 25 percent relative change in the weighted-average dumping margin between the A-to-A method and the appropriate alternative method where both rates are above the *de minimis* threshold, or the resulting weighted-average dumping margin moves across the *de minimis* threshold.[60]

ASB states that the *2008 Withdraw* was improper, and consequently, the Department is prohibited from applying an alternative comparison method to all U.S. sales. The Department disagrees. The Department asserts that the targeted dumping regulations, 19 CFR 351.301(d)(5),

[59] *See Preliminary Results*, and accompanying Decision Memo at 5.
[60] *Id.*

351.414(f) and 351.414(g)[61] were properly withdrawn, and therefore the application of the "limiting rule"[62] is moot.

IV. 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 results and the final weighted-average dumping margin in the *Federal Register*.

Agree ✓ Disagree _____

Paul Piquado
Assistant Secretary
for Enforcement & Compliance

23 DECEMBER 2013
(date)

[61] *See 1997 Rule.*
[62] *See* 19 CFR 351.414(f)(2) (2007).