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Administrative Review
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MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Holly A. Kuga
Acting Deputy Assistant Secretary
for Import Administration, Group II

SUBJECT: Issues and Decision Memorandum for the Final Results of the
2001-2002 Administrative Review of the Antidumping Duty Order on
Steel Concrete Reinforcing Bar from The Republic of Korea

Summary

The Department of Commerce (the Department) has analyzed the comments that interested parties submitted in the 2001-2002 administrative review of the antidumping duty order on steel concrete reinforcing bar (rebar) from the Republic of Korea (Korea). After analyzing these comments, we recommend making changes in the margin calculations, as discussed in the "Margin Calculations" section of this memorandum. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum.

Background

This administrative review covers rebar exported to the United States by Dongkuk Steel Mill Co., Ltd. and Korea Iron and Steel Co., Ltd., which were collapsed into a single entity for purposes of this administrative review. See Memorandum from Thomas F. Futtner, Acting Office Director, to Holly A. Kuga, Acting Deputy Assistant Secretary "Decision Memorandum: Whether to Collapse Dongkuk Steel Mill Co., Ltd. and Korea Iron and Steel Co., Ltd. Into a Single Entity," dated September 12, 2003 (Collapsing Memorandum). During the period of review (POR), rebar was imported and sold by Dongkuk Steel Mill's affiliate in the United States, Dongkuk International, Inc. (DKA). The POR is January 30, 2001, through August 31, 2002.

The Department issued its preliminary results on September 30, 2003. See Steel Concrete Reinforcing Bar from The Republic of Korea: Notice of Preliminary Results of Antidumping Duty Administrative Review, 68 FR 57883 (October 7, 2003) (Preliminary Results). In response to the Department's invitation to comment on the Preliminary Results of this review, the respondent and the petitioner¹ filed their case briefs on March 3, 2004. On March 10, 2004, the respondent and the petitioner filed rebuttal briefs. The respondent submitted a request for a public hearing, but subsequently withdrew its request on March 5, 2004.

List of Issues

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

1. Whether Dongkuk Steel Mill Co., Ltd. (DSM), Korea Iron and Steel Co., Ltd. (KISCO), and Dongkuk Industries Co., Ltd. (DKI) are affiliated
2. Whether the Department should "collapse" DSM and KISCO
3. Whether the Department should classify DSM's U.S. sales as weldable rebar
4. Whether the Department should correct a clerical error in the preliminary margin program to allow for the calculation of the CEP offset
5. Whether the Department should reverse its decision and reject DSM's sales, which are a major and significant correction to the sales listing
6. Whether DSM/KISCO's August 11, 2003 letter supports the acceptance of new factual information
7. Whether the Department can retroactively confer timely status

Changes in the Margin Calculations Since the Preliminary Results of Review

Based upon our analysis of the comments received from interested parties, for the final results we recommend making the following changes to the margin calculations used in the preliminary results of administrative review:

1. Combine the data submitted by KISCO since the Preliminary Results with the data most recently submitted by DSM in order to calculate a dumping margin for the collapsed entity DSM/KISCO.
2. Correct the error in the margin program that prevented the calculation of the CEP offset.
3. Reclassify the reported yield strength for DSM/KISCO's home market sales of ASTM A615

¹ The petitioner in this administrative review is the Rebar Trade Action Coalition and its individual members (collectively, the petitioner).

Grade 60 rebar from code “3” to code “4”. We have analyzed the mill test certificates for U.S. sales of ASTM A615 Grade 60 rebar and find that such sales should be categorized as yield strength “4” merchandise. See the Department’s Position for Comment 3 below. Although the mill test certificates for home market sales of this specification and grade were not available for analysis, rebar produced to satisfy ASTM A615 Grade 60 should be identical regardless of the market in which the rebar is sold. Since the evidence on the record indicates that DSM/KISCO’s U.S. sales of ASTM 615A Grade 60 rebar should be classified under yield strength code “4,” the Department reclassified DSM/KISCO’s home market sales of this grade rebar in the same manner.

4. Reclassify the reported yield strength for DSM/KISCO’s sales of KS SD400 rebar in the home market from code “3” to code “4”. DSM reported in its January 30, 2004, sales verification Exhibit 1 that the Korean standards for rebar changed on April 1, 2002. Part of that change included KS SD40 grade rebar being reclassified as KS SD400 grade rebar. A comparison of the technical requirements identified in SD40 and SD400 indicates that no significant changes were made in the product characteristics, other than the fact that KS SD400 does not have a carbon equivalency requirement. Since carbon equivalency is used to determine whether rebar is intended specifically for welding applications, removing the carbon equivalency from KS SD40 appears to have changed this specification from one intended for welding into one intended for general use purposes. There is no evidence on the record that, after April 1, 2002, DSM/KISCO changed the product characteristics of the rebar it produced and sold under the revised specification. DSM and KISCO produce two types of steel billet (mild-quality and high-strength) from which they both produce two types of rebar, also mild-quality and high-strength. Neither company has stated that they changed the type of billet or rebar produced in response to the change in the Korean specification. In DSM’s January 30, 2004, sales verification Exhibit 1, DSM stated, “{t}o implement this modification, DSM simply changed the description for the product codes used...,” thus indicating that the rebar DSM originally produced under SD40 remained the same but was given a new label, SD400. In addition, a price analysis of SD40 merchandise sold before April 1, 2002, and SD400 merchandise sold after April 1, 2002, indicates that the price of SD400 did not decrease, as would be expected since SD400 appears to be a general purpose grade of rebar. For further details on our pricing analysis, see Memorandum from Richard Johns, Case Analyst, to the File, “Price Analysis of KS SD40 and SD400 Rebar,” dated April 5, 2004. Moreover, at no point in the instant review did the Department give permission to DSM/KISCO to deviate from the codes provided in the yield strength field. Lastly, we weight-averaged the reported costs for CONNUMs 31, 32, 33, and 34 into the reported costs for CONNUMs 41, 42, 43, and 44.
5. Exclude sales of KS SD500 rebar from the home market sales database. KS SD500 rebar was coded as yield strength “3” merchandise in the home market. As noted above, the Department did not give DSM/KISCO permission to deviate from the codes provided in the yield strength field. The Department notes that, based on the change in the Korean standards which occurred on April 1, 2002, it appears that KS SD500 may have previously been classified as KS SD50 rebar, and that the KS SD50 specification required a carbon

equivalency of a maximum of 0.60 percent. Unlike grade KS SD40, the carbon equivalency requirement for KS SD50 is greater than the .55 threshold contained in the questionnaire. For this reason, it is unclear whether rebar satisfying KS SD500 should be reclassified as yield strength "2" or yield strength "4". If these sales had an effect on our calculations, the Department would be forced to consider using adverse facts available in attempting to include these sales in our analysis. However, since the sales of KS SD500 were made outside the window of contemporaneity, they have no effect on our calculations. Since these sales have no effect on our calculations, we excluded sales of KS SD500 from the home market sales database.

6. Use the sales and cost databases submitted after verification, which contain corrections to certain minor errors found during verification. On February 19, 2004, the Department requested the DSM/KISCO submit new sales and cost databases and provided an itemized list of changes to be made to the data. DSM/KISCO complied with our request and submitted its post-verification databases on February 27, 2004.
7. Correct for certain other minor errors found during verification that were not included in the Department's February 19, 2004, letter to the respondent. See Memorandum from Mark Manning, Senior Import Compliance Specialist, to the File, "Calculation Memorandum for the Final Results," dated April 5, 2004.

Discussion of the Issues

Comment 1: Whether DSM, KISCO, and DKI are affiliated

DSM/KISCO contends that the Department was incorrect when it preliminarily found KISCO and DKI to be affiliated with DSM. DSM/KISCO argues that there was no direct affiliation between DSM, KISCO, and DKI during the POR, or in any subsequent time period. According to DSM/KISCO, there is no direct corporate cross ownership between these three companies other than the fact that DSM owns less than five percent of KISCO's outstanding shares and DKI owns a very small percentage of DSM's outstanding shares. Furthermore, DSM/KISCO argues that there is neither an intertwining of management nor a financial relationship between DSM and the other two companies. DSM/KISCO contends that DSM satisfies none of the direct relationships used to find an affiliation between two persons that are outlined in section 771(33) of the Tariff Act of 1930, as amended (the Act). DSM/KISCO argues that there are no shared directors, employees, or facilities between the three companies.

DSM/KISCO notes that the Department based its preliminary determination of affiliation on the fact that the two brothers who are the largest shareholders of DSM, Sae Joo Chang and Sae Wook Chang, are nephews of two brothers, one of which (Sang Don Chang) is the largest shareholder of KISCO, while the other (Sang Kuhn Chang) is the largest shareholder of DKI. The Department concluded that the nephews and their uncles are affiliated under the statute, and that the extended "Chang family" collectively controls DSM, KISCO, and DKI. As a result, DSM/KISCO argues that

the Department inappropriately found that KISCO and DKI are indirectly affiliated with DSM under section 771(33)(F) of the Act, which defines affiliation as “{t}wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person.”

DSM/KISCO asserts that the Department’s reliance on section 771(33)(F) of the Act was incorrect because the Chang family grouping that the Department found to control the companies does not constitute a person. According to DSM/KISCO, the statutory phrase “any person” used in section 771(33) of the Act is meant to refer to a single person, not a grouping of relatives. According to DSM/KISCO, the Chang family is not “any person.” Instead, it is a somewhat arbitrary grouping of relatives—consisting of two nephews, Sae Joo Chang and Sae Wook Chang (who are the largest shareholders of DSM) and two of their uncles, Sang Don Chang and Sang Kuhn Chang (the largest shareholder of KISCO and the largest shareholder of DKI, respectively). DSM/KISCO argues that companies that are separately owned by separate members of the Chang family are not affiliated within the meaning of section 771(33)(F) of the Act because “any person” (*i.e.*, a single person) does not control those companies.

DSM/KISCO claims that, in the Preliminary Results, the Department glossed over this issue by assuming that, pursuant to section 771(33)(A) of the Act, the nephews are affiliated with both of their uncles and, due to this affiliation, that any company controlled by the nephews or their uncles must be affiliates. DSM/KISCO argues that the statute does not allow such an interpretation. The affiliated members of a family remain “persons” in the plural and cannot be considered a single person. According to DSM/KISCO, even if the nephews and uncles are affiliated, there is still not one “person” that controls DSM, KISCO, and DKI, but rather four different people that control the different companies.

DSM/KISCO notes that 19 C.F.R. § 351.401(f) allows the Department to treat two or more affiliated producers as a single entity when these producers have similar production facilities that would not require substantial retooling of either facility in order to restructure manufacturing priorities and there exists a significant potential for the manipulation of price or production. According to DSM/KISCO, the existence of this provision confirms that “affiliated persons” are not automatically collapsed and treated as a single entity for purposes of the Department’s analysis. Instead, affiliated producers are collapsed only if certain criteria are met. DSM/KISCO emphasizes that when such criteria are not met, the affiliated producers are treated as separate entities.

DSM/KISCO argues that there is nothing in the statute that allows the Department to “collapse” affiliated members of a family and treat them as a single entity without considering whether the family grouping is a vehicle for control by a single member of the family. DSM/KISCO argues that the Department found the Chang family members to be affiliated but that the Department did not find that a single “person” within the Chang family controls DSM, KISCO, and DKI. According to DSM/KISCO, the only way to find that DSM, KISCO, and DKI are affiliates under the statute is for the Department to find that a single person controls them. Instead, DSM/KISCO argues that the

Department found only that the nephews and their uncles are affiliates. Such affiliation does not transform the nephews and their uncles into a single “person.” Thus, DSM/KISCO concludes that the statutory requirements for finding that DSM, KISCO, and DKI are affiliates have not been satisfied.

In its rebuttal brief, the petitioner argues that the Department should continue to find that DSM, KISCO, and DKI are affiliated. The petitioner notes that the Statement of Administrative Action (SAA), in explaining the intent of Congress toward affiliation issues, states that “{t}he traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm ‘operationally in a position to exercise restraint or direction’ over another even in the absence of an equity relationship.” The SAA provides examples of the new types of relationships that the Department may consider under the definition of affiliation such as “corporate or family groupings.”

The petitioner also notes that 19 C.F.R. § 351.102(b) defines the terms “affiliated persons” and “affiliated parties.” Within this definition, the regulation states that “{i}n determining whether control over another person exists, ... the Secretary will consider the following factors, among others: corporate or family groupings ...”. Furthermore, the petitioner states that 19 C.F.R. § 351.102(b) also states that the term “person” is defined as including “any interested party as well as any other individual, enterprise, or entity, as appropriate.”

The petitioner argues that the courts have upheld both the definition of a person as encompassing members of a family as well as the Department’s ability to interpret the singular form of the word “person” in the context of section 771(33) of the Act to include members of a family.

The petitioner cites Ferro Union, Inc. and Asoma Corporation v. United States, 44 F. Supp. 2d 1310, 1326 (Court of International Trade (CIT) 1999) (Ferro Union), where the CIT upheld the definition of “person” as encompassing members of a family as well as the Department’s ability to interpret the singular form of the word “person” in the context of section 771(33) of the Act to include members of a family. In that decision, the CIT stated that

The court, however, finds that the singular word ‘person’ can be interpreted to encompass a ‘family’ in order to carry out the intent of the statute.....As previously discussed, the intent of 19 U.S.C. § 1677(33) was to identify control exercised through ‘corporate or family groupings.’ SAA at 838. By interpreting ‘family’ as a control person, Commerce was giving effect to this intent.

In addition, the petitioner cites a recent administrative review where the Department faced the same fact pattern involving DSM and DKI, for a nearly identical time period, and found that family members are affiliated under section 771(33)(A) of the Act, and that the companies under control of those family members are also affiliated under section 771(33)(F) of the Act. See Structural Steel Beams From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 69 FR

7200 (February 13, 2004) and accompanying Issues and Decision Memorandum at Comment 3. The petitioner concludes that given the history of interpretation on family groupings in the context of antidumping reviews, the strong statements supporting those interpretations by the courts, and the virtually identical fact patterns in prior cases involving DSM, the Department should continue to consider DSM, KISCO, and DKI as affiliated parties for the final results.

Department's Position:

We disagree with DSM/KISCO. Section 771(33)(F) of the Act states that “{t}wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person” shall be considered to be affiliated persons. Although this section of the statute uses the singular phrase “any person,” the CIT has recognized that “the singular word ‘person’ can be interpreted to encompass a ‘family’ in order to carry out the intent of the statute.” See Ferro Union, 44 F. Supp. 2d at 1326 citing St. Louis v. Missouri, 263 U.S. 640, 657, 68L. ED. 486, 44 S. Ct. 213 (1924), (“words importing the singular may {not} extend and be applied to several persons or things ... *except where it is necessary to carry out the evident intent of the statute* (emphasis added).”). As the CIT noted in Ferro Union, “the intent of 19 U.S.C. § 1677(33) was to identify control exercised through ‘corporate or family groupings.’ SAA {Statement of Administrative Action} at 838. By interpreting ‘family’ as a control person, Commerce was giving effect to this intent.” See Ferro Union 44 F. Supp. 2d at 1325; see also, 19 C.F.R. § 351.102(b) (“{i}n 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 ...). Additionally, in past cases involving control through corporate or family groupings, the Department has noted that the control factors of individual members of the group (e.g., stock ownership, management positions, board membership) are considered in the aggregate. See Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil; Notice of Final Determination of Sales at Less Than Fair Value, 65 FR 5554, 5566 (February 4, 2000).

In the instant review, the Chang family’s leadership positions, namely Sae Joo Chang’s position as the Chairman and Chief Economic Officer of DSM, Sae Wook Chang’s position as a Director of DSM, Sang Don Chang’s position as Chairman of KISCO, and Sang Kuhn Chang’s position as the Chairman of DKI, as well as the fact that the Chang family owns the largest blocks of outstanding shares in DSM, KISCO and DKI, places the Chang family in a position to legally and/or operationally restrain or direct DSM, KISCO and DKI. Although DSM/KISCO argued that Sae Joo Chang and Sae Wook Chang do not act in concert with their uncles, Sang Don Chang and Sang Kuhn Chang, in defining family groupings, the Department is not required to find that a group acted in concert. Rather, the Department is concerned with the potential of a group to act in concert or out of common interests. See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from Taiwan, 67 FR 35474 (May 20, 2002) and accompanying Issues and Decision Memorandum at Comment 4. Thus, while no single individual is in a position to restrain or direct the activities of DSM, KISCO and DKI, the Department considers the Chang family to be “a person” for purposes of section 771(33)(F) of the Act. Because this family grouping has the potential

to control DSM, KISCO and DKI, and its actions may potentially impact decisions concerning pricing of the subject merchandise, we have determined that DSM, KISCO and DKI are affiliated under the Act.

Comment 2: Whether the Department should “collapse” DSM and KISCO

DSM/KISCO argues that the Department should not collapse DSM and KISCO into a single entity because the Department found no evidence that members of the extended Chang family have the ability or incentive to coordinate their actions in order to direct DSM and KISCO to act in concert with each other, or that the family grouping is actually a vehicle for control by a single person. Instead, DSM/KISCO states that the Department based its decision to collapse DSM and KISCO into a single entity on its finding that there exists a significant potential for the manipulation of price or production based primarily on the fact that the two brothers who are the largest shareholders of DSM are nephews of the largest shareholder of KISCO. DSM/KISCO notes that the Department stated in its decision memorandum that the “potential for greater access to financial and other information may be provided by the fact that Chang family members sit at or near the top of both companies’ management.”

DSM/KISCO observe that, in its analysis of whether there exists a significant potential for the manipulation of price or production, the Department relied upon the fact that several current directors or officers of DSM and KISCO were, respectively, directors or officers at the other company from between 5 to 23 years ago. As all of these transfers occurred well before the investigation period and this review period, DSM/KISCO asserts that there is no reason to believe that these transfers contributed to a significant potential for the manipulation of price or production during the review period.

Lastly, regarding the issue of whether DSM and KISCO have intertwined operations, DSM/KISCO states that the evidence cited by the Department is not sufficient to collapse DSM and KISCO into a single entity. Specifically, DSM/KISCO claims that the interactions cited by the Department (*i.e.*, home market sales to each other, sharing limited sales information, use of an affiliated transportation company, both companies owning shares in certain other companies, and sharing common affiliation with DKA, DSM’s U.S. sales affiliate) are minimal. DSM/KISCO argues that there is no evidence on the record that DSM and KISCO share financial information or participate in pricing decisions in a manner that would allow the coordination of sales and production activities.

In sum, DSM/KISCO claims that the Department’s preliminary determination applied an impermissible irrebuttable presumption under which producers that count uncles and nephews among their largest shareholders must always be collapsed. That result is unfair and fundamentally inconsistent with the requirements of the regulations.

In its rebuttal brief, the petitioner argues that the Department’s decision to collapse DSM and KISCO into a single entity was correct. The petitioner notes that the Department relied upon several

factors in making its decision that there exists a significant potential for manipulation of price or production, such as the jointly owned U.S. sales affiliate, the fact that the largest shareholders of each company - as well as additional affiliates - are members of the same family grouping, and that these family members hold positions in senior management and the board of directors. The petitioner also finds it significant that KISCO's affiliate, DKI, plays a role in DSM's U.S. and home market sales of various products, and in supplying major inputs. In addition, the petitioner notes that DSM, KISCO, and DKI own shares in two affiliated transportation companies.

Regarding the sharing of financial information, the petitioner points out that the appropriate test is whether there is the potential for manipulation, not actual manipulation. The petitioner concludes that the Chang family members are in a position to exert influence over both companies, and thus, satisfy the requirements for collapsing.

The petitioner also offers an additional analysis for determining control under section 771(33) of the Act, and the potential for manipulation. The petitioner provides two articles regarding the historical Korean practice of corporate control via *kasin*. According to the petitioner's articles, *kasin* are family vassals whose role is modeled after servants in Korea's ancient royal courts.² According to the petitioner, *kasins* are a fixture of Korean chaebols, frequently beginning their career as personal secretaries for the corporate founder. The petitioner claims that *kasins* are fiercely loyal, often siding with the family over shareholders. One article states "{a} founding family usually controls only 5 to 10 percent of the stock, but by placing loyal managers to run inter-locking subsidiaries, it could run the conglomerate like an empire." The petitioner asserts that this behind-the-scenes mechanism demonstrates how the controlling family, even as a minority shareholder, exerts influence over the objection and rights of shareholders. According to the petitioner, this is the type of non-traditional analysis that Congress intended the Department to investigate by referring to corporate or family groupings and control even in the absence of equity.

Department's Position:

We agree with the petitioners. When considering whether to collapse two companies into a single entity for the purposes of an antidumping investigation or administrative review, 19 C.F.R. § 351.401(f) states that the Department will treat two or more affiliated producers as a single entity where: (1) those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities; and (2) where there is a significant potential for the manipulation of price or production. In identifying a significant potential for the manipulation of price or production, the factors the Department may consider include: (A) the level of common ownership; (B) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (C) whether

² See Exhibit 1 of the March 10, 2004, Petitioner's Rebuttal Brief.

operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between affiliated producers.

In examining these factors as they pertain to a significant potential for manipulation, we consider both actual manipulation in the past and the possibility of future manipulation. See Preamble to Final Regulations, 62 FR 27296, 27346 (May 19, 1997). The preamble underscores the importance of considering the possibility of future manipulation: “a standard based on the potential for manipulation focuses on what may transpire in the future.” Id. We have, therefore, examined all three factors in light not only of actual manipulation during the POR but also with respect to the possibility of future manipulation.

In our September 12, 2003, decision to collapse DSM and KISCO into a single entity for the purposes of this review, we found that (1) DSM, KISCO, and DKI are affiliated; (2) a shift in production would not require substantial retooling (if any); and (3) there is a significant potential for price or production manipulation due to, among other factors, evidence of significant common ownership and management overlap by senior managers who (a) have a significant influence over the production and sales decisions of both companies; (b) belong to the same family; and (c) are former managers of the other company. Based on this analysis, we found that the record evidence weighs in favor of collapsing DSM and KISCO for the purposes of this administrative review.

We disagree with DSM/KISCO’s contention that members of the Chang family do not have the ability or incentive to coordinate their actions in order to direct DSM and KISCO to act in concert with each other. It is undisputed that the Chang family is the largest shareholder in DSM and KISCO, both currently and during the POR. Sae Joo Chang and Sae Wook Chang are the two largest shareholders in DSM while their uncle, Sang Don Chang, is the largest shareholder in KISCO. See DSM sales verification Exhibit 2 and KISCO sales verification Exhibit 2. Besides being the largest shareholders, the Chang family also holds senior leadership positions in both DSM and KISCO. Specifically, Sae Joo Chang is the Chairman of DSM, his brother Sae Wook Chang is a Director at DSM, and their uncle Sang Don Chang is the Chairman of KISCO. The fact that the Chang family is the largest shareholder in DSM and KISCO, combined with the fact that the Chairman of the Board and other senior management positions in both DSM and KISCO are held by members of the Chang family, clearly shows that the Chang family has the ability and financial incentive to coordinate their actions in order to direct DSM and KISCO to act in concert with each other. As mentioned above, the Department is not required to find that DSM and KISCO have acted in concert. Rather, the Department is concerned with the potential for DSM and KISCO to act in concert or out of common interests.

In addition, there have also been several prominent transfers of senior managers between the two companies. See Collapsing Memorandum. Although DSM/KISCO is correct that these transfers were not in the recent past, there was a significant transfer that occurred only three years before this

POR: Sang Don Chang left his position as president of DSM in 1998, and currently serves as the Chairman of KISCO. The Department recognizes that the transfers between DSM and KISCO are not recent occurrences, except for the movement of Sang Don Chang in 1998. However, our determination that there exists the potential for manipulation of price or production does not rest on these transfers alone. Instead, as we stated in the Collapsing Memorandum, the close management relationship between DSM and KISCO, as evidenced by these transfers, was one of several factors that lead to our determination that there exists a significant potential for the manipulation of price or production between KISCO and DSM.

Regarding the intertwining of operations, the Department found there were intertwined transactions by DSM and KISCO which resulted in: (a) sales to each other; (b) sharing certain sales information; (c) utilizing an affiliated transportation company, and; (d) jointly owning shares in other companies (i.e., DKA and Kukje Transportation Company). In addition, DSM and KISCO share a common affiliation with DKI, which is a member of the Chang family group of companies that resells several of DSM's steel products in Korea and to the United States and supplies KISCO with refractories and ferrite. We disagree with DSM/KISCO's characterization of these intertwined operations as "minimal." Both DSM and KISCO jointly own shares in DKI and DKA, which play a central role in reselling and distributing various steel products within Korea and to the United States.³ Further, the fact that they both utilize an affiliated transportation company, Chunyang Transportation Co., Ltd. (Chunyang), demonstrates that they continue to conduct business with members of the Dongkuk "chaebol" family of companies.

In making its decision to collapse two producers for antidumping purposes, the Department considers the totality of circumstances of the situation and may place more reliance on some factors than other factors. As indicated above, 19 C.F.R § 351.401 outlines some of the factors that may be considered in making the collapsing decision. Not all of these factors may be present in every situation where there is a significant potential to manipulate price or production. Based on the totality of the circumstances discussed above, the Department continues to find that these circumstances indicate that there is a significant potential to manipulate the production and pricing of the subject merchandise.

Based on the preceding discussion, we conclude that the two affiliated producers are

³ In the Collapsing Memorandum, the Department noted that a Custom data query identified DKI as the manufacturer/exporter of certain entries of rebar produced by DSM. Since issuing that memorandum, the Department has verified both DSM and DKI and confirmed that DSM did not sell rebar through DKI to the United States during the POR. However, DKI did sell non-subject merchandise to DKA during the POR. See Memorandum from Mark Manning and Richard Johns, Case Analysts, to the File, "Verification of the Information Concerning Dongkuk Industries Co., Ltd.," dated February 19, 2004, on file in the Central Records Unit, Room B-099 of the main Commerce building (CRU).

sufficiently related so as to warrant treatment as a single enterprise, and that collapsing these entities may prevent evasion of the antidumping duty order. See Certain Fresh Cut Flowers From Colombia: Final Results of Antidumping Duty Administrative Reviews, 61 FR 42853, 42853 (August 19, 1996). Applying the criteria of our collapsing inquiry as set forth above, we continue to find (1) DSM, KISCO, and DKI are affiliated under section 771(33)(A) and (F) of the Act, (2) a shift in production would not require substantial retooling (if any), and (3) there is a significant potential for price or production manipulation due to, among other factors, evidence of significant common ownership and management overlap by senior managers who have a significant influence over the production and sales decisions of both companies, belong to the same family and, one of which, was in the recent past the President of the other company. Based on this analysis, we have determined that the totality of the record evidence weighs in favor of collapsing DSM and KISCO for the purposes of this review of the antidumping duty order on rebar from Korea.

Comment 3: Whether the Department should classify DSM's U.S. sales as weldable rebar

DSM/KISCO argues that the Department should reverse its decision to reclassify the yield strength of its sales of ASTM A615 Grade 60 rebar from the reported yield strength code "3" to yield strength code "4". DSM/KISCO states that in the original investigation, the Department considered yield strength and carbon equivalency to be one of the product matching criteria, and accepted the methodology proposed by DSM/KISCO, of treating products with an unspecified carbon equivalency as a separate category for matching purposes. DSM/KISCO explains that the ASTM A615 Grade 60 standard does not specify a maximum or minimum carbon equivalency, unlike KS Grade 40 standard, which does specify a carbon equivalency of less than 0.55 percent. Consequently, DSM/KISCO claims that it does not control the carbon equivalency of the rebar it produces to the ASTM A615 Grade 60 standard. As in the investigation, DSM/KISCO designated sales of rebar produced to the ASTM A615 Grade 60 standard as having a yield strength code of "3" to reflect that the product does not take carbon equivalency into account.

DSM/KISCO argues that the Department's longstanding practice has been to continue to use the product-matching criteria established in the original investigation in all subsequent reviews, unless there are "compelling reasons" to change. The respondent states that, in this review, the Department has changed its product-matching methodology from the original investigation without a compelling reason for doing so, and is now reclassifying rebar reported under yield strength code "3" as having a yield strength of "4". According to DSM/KISCO, this reclassification implies that all of DSM's U.S. sales of ASTM A615 Grade 60 rebar consisted of weldable rebar, which does not reflect the commercial reality that DSM/KISCO does not control carbon equivalency for its U.S. sales of this grade. Furthermore, DSM/KISCO argues that some of DSM/KISCO's U.S. sales of ASTM A615 Grade 60 rebar consist of rebar produced from different production heats, and so have multiple carbon equivalencies for the same product in a single line-item in the sale transaction. As a result, for these particular sales, U.S. customers may receive merchandise that has a carbon equivalency above or below .55 percent. DSM/KISCO argues that the Department should assign its U.S. sales of ASTM

A615 Grade 60 rebar a yield strength code of “3”, as was reported by DSM/KISCO in its questionnaire responses.

In its rebuttal brief, the petitioner argues that the Department did not change its model-match methodology since the Department continued to use the same physical characteristics and hierarchy of those characteristics as was used in the original investigation. Instead, the petitioner asserts that the Department corrected DSM/KISCO’s reporting of the yield strength variable for DSM/KISCO’s U.S. sales based on substantial record evidence. The petitioner asserts that DSM/KISCO’s alternative yield strength code “3”, introduced in the original investigation, was not used in the instant review because DSM/KISCO did not meet its burden of proof that yield strength code “3” provides meaningful differences for matching purposes. The petitioner alleges that DSM/KISCO’s alternative yield strength category seeks to avoid a significant physical criterion that the Department has deemed to be important. Furthermore, the petitioner contends that substantial evidence on the record indicates that DSM/KISCO could report its U.S. sales within the two yield strength categories provided by the Department’s questionnaire, as either yield strength code “2” or “4”. The petitioner asserts that DSM/KISCO’s motivation for reporting its U.S. sales of ASTM A615 Grade 60 rebar under yield strength code “3”, based on the rationale that the ASTM specification does not have a requirement for carbon equivalency, would allow DSM/KISCO to manipulate the Department’s model match and have its U.S. sales of ASTM A615 Grade 60 rebar compared only to a small quantity of home market sales of ASTM specification rebar.

The petitioner also disagrees with DSM’s claim that “the Department simply assumed that all of DSM’s U.S. sales consisted of weldable rebar.” The petitioner states that the Department made a careful analysis of the mill test certificates available at the time of the Preliminary Results and found that the vast majority of the DSM/KISCO’s U.S. sales of ASTM A615 Grade 60 rebar had a carbon equivalency of less than 0.55 percent, and should have been reported under yield strength code “4”. Thus, the Department’s decision in the Preliminary Results to consider all ASTM A615 Grade 60 rebar as strength “4” was supported by substantial record evidence.

The petitioner also claims that the table supplied by DSM/KISCO in its February 2, 2004, submission produces similar results. In that table, which listed the carbon equivalency of all of DSM’s U.S. sales, the vast majority of the ASTM A615 Grade 60 rebar had a carbon equivalency of less than 0.55 percent. Therefore, the petitioner claims that nearly all of DSM/KISCO’s U.S. sales of ASTM A615 Grade 60 rebar would qualify, on the basis of actual carbon equivalency, as having a yield strength of “4.” For this reason, the petitioner concludes that the Department had “compelling reasons” in the instant review to disregard DSM’s proposed yield strength category “3” and it is appropriate for the Department to continue to classify all U.S. sales of ASTM A615 Grade 60 rebar as having a yield strength code of “4”.

Department’s Position:

We agree with the petitioner. The Department's questionnaire asked DSM/KISCO to report the yield strength of rebar using the following codes:

- 1 = minimum yield strength of less than 55,000 pounds per square inch (psi)
- 2 = minimum yield strength greater than or equal to 55,000 psi and less than 75,000 psi and carbon equivalent of greater than or equal to 0.55% (non-weldable)
- 4 = minimum yield strength greater than or equal to 55,000 psi and less than 75,000 psi and carbon equivalent of less than 0.55% (weldable)
- 7 = minimum yield strength of 75,000 psi or greater

In its response, DSM/KISCO reported, without the Department's permission, a new code of "3", which has a yield strength greater than or equal to 55,000 psi and less than 75,000 psi, but with no specification for carbon equivalency.⁴ DSM/KISCO reported its sales of rebar for which it did not control for carbon equivalency during production as yield strength code "3". The categorization of these sales as yield strength code "3" is incorrectly based on the rebar's specification-based characteristics rather than its actual physical characteristics.

The above yield strength codes were to be assigned based on the instructions in the CONNUM field, which instruct DSM/KISCO to "{a}ssign a control number to each unique product reported in the...sales data file." The instructions also stated that "{i}dential products should be assigned the same control number..." based on "physical characteristics". The instructions for field number 3.2, yield strength, do not request specification-based characteristics, but do request the categorization of rebar within specified ranges. The instructions for field number 3.6, actual yield strength, instruct DSM/KISCO to report the specific yield strength of each rebar sale, and similarly, do not request specification-based characteristics. As noted above, the resulting CONNUM should be based on "physical characteristics" rather than specification-based characteristics.

Contrary to DSM/KISCO claims, the Department did not change its model-match methodology in this administrative review. We have continued to use the same physical characteristics and hierarchy of those characteristics which were used in the original investigation. Although the Department did allow DSM/KISCO to report certain sales with a yield strength code "3" during the original investigation, this review is a separate segment of the proceeding and, as such, the Department has the ability to analyze the data reported by DSM/KISCO, develop a body of evidence distinct from the investigative evidence, and act accordingly. In this review, we issued many supplemental questions regarding DSM/KISCO's home and U.S. market sales reported with a yield strength code "3". As a result of these supplemental questions, we developed a substantial record of evidence regarding yield strength and carbon equivalency. Based upon the record evidence, the Department preliminarily found it appropriate to reclassify DSM/KISCO's U.S. sales from a yield strength code "3" to code "4".

⁴ See DSM's December 16, 2002 submission, Appendices B-2 and C-2.

In order to classify the rebar manufactured by DSM/KISCO into the appropriate yield strength categories established by the Department in the original investigation, and used in this review, we requested that DSM/KISCO “identify the carbon equivalency of these sales,” and then use that information to “report the actual yield strength for the ASTM A615 sales.”⁵ DSM/KISCO responded that the mill test certificate was the only document that identifies the yield strength for individual sales, and that its computerized sales records did not identify the mill test certificates for each shipment. Consequently the only way to identify the mill test certificate for a sale would have been to review all mill test certificates manually. DSM/KISCO estimated that finding the mill certificates for each individual home-market and U.S. sale during the review period would take over a month of work,⁶ and did not perform the requested analysis.

DSM argues that it does not control for carbon equivalency when it produces rebar to meet specifications that do not explicitly require a particular carbon equivalency, such as ASTM A615 Grade 60. If the carbon equivalency is not controlled for during production, it is reasonable to expect a wide variation in the actual carbon equivalency that results. In order to examine the variability of the actual carbon equivalency in DSM/KISCO’s U.S. sales of ASTM A615 Grade 60 rebar, we examined all mill test certificates for U.S. sales which were available to the Department at the time of the Preliminary Results. Those included mill test certificates received from U.S. Customs and Border Protection (CBP) which were included as part of our May 7, 2003, letter; mill test certificates included in DSM’s September 3, 2003, submission; and mill test certificates provided by CBP, which were placed upon the record as a memorandum to the file on September 30, 2003. See Memorandum from Richard Johns, International Trade Compliance Analyst, Group II Office IV to the File, “Memorandum to the File: U.S. Bureau of Customs and Border Protection Data Query,” dated September 30, 2003.

The results of our analysis showed that the vast majority (by weight) of DSM/KISCO’s U.S. sales of ASTM A615 Grade 60 rebar had an actual carbon equivalency of less than .55 percent. Since the specification ASTM A615 requires that rebar qualifying for Grade 60 have a yield strength of greater than or equal to 55,000 psi and less than 75,000 psi, our analysis indicates that, on an actual basis, these sales are appropriately categorized as having a yield strength code “4”. Although ASTM A615 Grade 60 does not specify a carbon equivalency, our analysis indicates that the rebar DSM/KISCO produced to meet this grade does not have the variability that would be expected for a factor that is not controlled for in the production process. Because the vast majority of the ASTM A615 Grade 60 rebar that we examined had a carbon equivalency of less than .55 percent, we reclassified the yield strength for sales of this grade from code “3” to code “4” in the Preliminary Results. See Memorandum from Mark Manning, Senior Import Compliance Specialist, to the File, “Calculation Memorandum for the Preliminary Results,” dated September 30, 2003.

⁵ See The Department’s January 28, 2003 supplemental B, and February 5, 2003 supplemental C questionnaires, questions B-2, and C-2, respectively.

⁶ See DSM’s February 28, 2003 and March 7, 2003 submissions.

As part of verification, the Department requested and obtained mill test certificates for all rebar sold by DSM/KISCO in the United States.⁷ This complete set of mill certificates included the partial set the Department analyzed for the Preliminary Results and all of the remaining mill certificates for the U.S. sales of ASTM A615 Grade 60. After analyzing the mill test certificates for sales of this grade, the Department found that, based on weight, the vast majority of rebar sold in the U.S. market meeting this grade had an actual carbon equivalency of less than .55 percent (yield strength code “4”). Since our analysis of the full set of mill certificates for U.S. sales of this grade of rebar produced nearly identical results as the analysis done for the Preliminary Results, we have continued to reclassify U.S. sales of ASTM A615 Grade 60 rebar from a yield strength code “3” to code “4.” Moreover, for the final results, we also re-classified DSM/KISCO’s home market sales of ASTM A615 Grade 60 rebar. See the Changes in the Margin Calculations Since the Preliminary Results of Review section above.

Comment 4: Whether the Department should correct a clerical error in the preliminary margin program to allow for the calculation of the CEP offset.

DSM/KISCO argues that the Department made a programming error in the margin program used in the Preliminary Results that prevented the program from granting the CEP offset. DSM/KISCO requests that the Department correct this programming error for the final results of review.

The petitioner did not comment on this issue.

Department’s Position:

The Department agrees with DSM/KISCO. The Department intended to grant DSM/KISCO the CEP offset in the Preliminary Results. However, DSM/KISCO is correct that there was an error in the margin program that prevented this adjustment from being granted. We have corrected the programming error in the manner suggested by DSM/KISCO in its March 3, 2004, case brief.

Comment 5: Whether the Department should reverse its decision and reject DSM’s sales, which are a major and significant correction to the sales listing

The petitioner argues that the Department’s preliminary decision to accept DSM’s unreported U.S. sales is reversible. Although the Department allowed the submission of the rejected response on the record, allowed additional “untimely information” in DSM’s sales reconciliation⁸ and in its August

⁷ See DSM’s February 2, 2004 submission.

⁸ The petitioner is referring to DSM’s Documents and Worksheets demonstrating how the Sales Report in the 2001-02 Administrative Review were identified (Sept. 9, 2003) (“DSM’s Sales Reconciliation”).

11, 2003 letter, and proceeded with verification, the petitioner contends that Department's decision must be reversible or else its due process rights will be violated.

The petitioner also asserts that it is outside of the Department's normal practice to permit a respondent to correct a failure to report one-third of its total U.S. sales through the supplemental process. The petitioner questions DSM/KISCO's claim that it intended to present a corrected sales list containing these additional sales at the start of verification, as the Department would not consider the failure to report one-third of total U.S. sales as a minor correction which may be corrected at the start of verification. Based on the magnitude of the omission, the petitioner believes that the Department should treat this as a major deficiency, and apply adverse facts available.

In response to petitioner's first argument, DSM/KISCO reasons that because the Department verified the accuracy of its revised U.S. sales listing, and no significant discrepancies were found, there is no basis for the Department to reverse the preliminary results of review and ignore the verified information on the record.

In response to petitioner's second argument, DSM/KISCO does not dispute the quantity of its omitted sales, but contends that their omission of from its previous submissions was the "result of understandable, but unfortunate, errors..." See DSM/KISCO Rebuttal Brief at 1-2. DSM/KISCO argues that the correction of those errors was an appropriate response to the Department's May 7, 2003, supplemental questionnaire.

Department's Position:

We agree with the petitioner, in part, and with the respondent, in part. The petitioner argues that the additional sales DSM/KISCO included in its May 14, 2003, sales database are significant and not minor corrections of errors in the reported sales listing. We agree with that characterization. In its May 14, 2003, submission, DSM/KISCO reported a large and significant number of previously unreported U.S. sales. We also agree with the petitioner that the Department has the ability to reverse its previous decision to accept the submission of DSM/KISCO's previously omitted sales.

However, we do not agree with the petitioner that the Department should reverse its acceptance of those sales or that the Department cannot allow a respondent the opportunity to correct major errors during the supplemental questionnaire process. While the Department is concerned when a respondent makes significant changes in its reported information, the regulations clearly show that the Department may exercise discretion on a case-by-case basis in accepting new information. For instance, 19 C.F.R § 351.301(b)(2) allows respondents to submit new factual information at any time up to 140 days after the last day of the anniversary month. While this deadline had passed by the time DSM/KISCO submitted the additional sales on May 14, 2003, this provision does illustrate the principle that the Department recognizes that respondents' initial submissions may contain errors, even ones that are significant. Moreover, the Department has the discretion to allow respondents to correct

errors in reported information after the 140 day deadline has passed. 19 C.F.R § 351.301(c)(2)(i) states that “...the Secretary may request any person to submit factual information at any time during a proceeding.” In addition, 19 C.F.R § 351.301(b)(2) states that “...the Secretary may, for good cause, extend any time limit established...” Although the Department did not specifically request additional sales to be reported or extend the time limit allowed for submitting new information in this instance, these regulations show the Department’s ability to exercise its discretion, taking into consideration the unique circumstances existing in each case. For example, if a respondent notifies the Department that it has found a significant error in its reported information and requests the opportunity to correct the error, the Department will review the nature of the error, the reasons provided by the respondent as to why the error was made, whether there is sufficient time before the applicable determination to allow the Department and the petitioner the opportunity to review and analyze the corrected data, and any other factor relevant to deciding whether to allow the revised information to be placed on the record.

As discussed more fully below, this is the process that the Department followed in the instant review. The Department reviewed the parties’ arguments regarding these sales and, based upon our analysis of these arguments, decided to exercise our discretion to allow the sales information to return to the record of the review.

Regarding the respondent’s August 11, 2003, statement that it intended to present the corrected sales list at the start of verification, we agree with the petitioner that the Department would not accept such a significant change to the reported U.S. sales database on the first day of verification. It is the Department’s long-standing practice to accept only minor changes at the beginning of verification. However, the sales in question were not presented at verification.

Comment 6: Whether DSM/KISCO’s August 11, 2003 letter supports the acceptance of new factual information

The petitioner asserts that the Department relied upon the arguments made in DSM/KISCO’s August 11, 2003, letter when it reversed its prior decision to reject the additional sales placed on the record by DSM/KISCO. The petitioner provides several reasons as to why the Department should reject the arguments made by DSM/KISCO in its August 11, 2003, letter.

First, the petitioner notes that DSM/KISCO, in its August 11, 2003 letter, claims that the rejected sales information was a timely correction of an error in its prior submission. The petitioner notes that DSM/KISCO stated that it discovered its error on March 7, 2003, and notified the Department in its response of that same day that it was in the process of reviewing its sales listing and would submit additional sales to the Department as soon as any were discovered. The petitioner argues that, through this statement, DSM/KISCO granted itself an extension for filing a complete U.S. sales listing. The petitioner states that the Department does not allow respondents to grant themselves extensions, and that the self-granted extension occurred three weeks prior to the scheduled verification date.

Second, the petitioner argues that the failure to report one-third of its total U.S. sales database was not due to a simple oversight, as claimed by DSM/KISCO. According to the petitioner, the instructions contained in the Department's questionnaire regarding how to identify which sales to report were clear. Given that all of DSM/KISCO's sales were CEP transactions sold before importation, the petitioner notes that the questionnaire required DSM/KISCO to report all of its sales that entered within the POR. Since all of DSM/KISCO's U.S. sales are made through its U.S. affiliate, DKA, the petitioner contends that DSM/KISCO had access to and control of all sales information.

Third, the petitioner also claims that DSM/KISCO's explanations are not consistent with the record. On December 16, 2002, DSM/KISCO placed its U.S. sales listing on the record, and on March 7, 2003, DSM/KISCO deleted some of those sales, which had been "inadvertently included" in its previous submission. In its March 7, 2003, submission, the petitioner notes that DSM/KISCO stated that it understood that it should include any sales with entries during the POR, but it took the step of deleting certain sales it had previously reported. In its August 11, 2003, letter, DSM/KISCO stated that, on March 7, 2003, it misinterpreted the instructions in the questionnaire and mistakenly excluded certain sales. Moreover, in its August 11, 2003, letter, DSM/KISCO stated that it had been aware on the morning of March 7, 2003, that its information was inaccurate, but did not tell the Department and even certified to the data's accuracy on the same day. Based on DSM's prior experience in antidumping proceedings and the fact that it has retained experienced counsel, the petitioner does not believe that it inadvertently omitted one-third of its total U.S. sales.

Fourth, the petitioner contends that even if the Department determines that DSM's errors were inadvertent, total adverse facts available should be applied. The petitioner argues that the Department has determined, and the courts have upheld that inadvertence in reporting a complete sales listing does not cure the deficiency. The petitioner cites Reiner Brach GmbH & Co. v. United States, 206 F. Supp. 2d 1323, 1333, 1336 (CIT, 2002), where the CIT upheld the Department's determination to apply facts otherwise available and an adverse inference resulting from Reiner Brach's failure to provide all information regarding home market sales. According to the petitioner, the court noted "Reiner Brach failed to provide information regarding home market sales of similar merchandise despite the clear language of the questionnaire asking for information on 'all sales' of the foreign like product." Furthermore, the petitioner argues that the Department has placed great emphasis on the fact that respondents have the ability to report sales, even if the omission was inadvertent. See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Intent Not to Revoke in Part: For the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 68 FR 47020 (August 7, 2003) (where the Department noted that the CIT stated, in its decision to uphold the Department's application of adverse facts available, that the respondent 'has made no allegations that it could not provide the additional U.S. sales. It claims that the omission was inadvertent; inadvertence is not the same as inability.'). Since DSM/KISCO had the ability to report these sales, and has only claimed that it made an inadvertent error, the petitioner argues that the Department should assign total adverse facts available for the final results of this review.

Fifth, the petitioner contends that DSM/KISCO did not have the ability to submit new factual information because the deadline for submitting new factual information had passed. DSM/KISCO supplied a new U.S. sales database with its May 14, 2003, supplemental response, which contained sales not reported in its March 7, 2003, U.S. sales database. The deadline for filing new factual information had expired on February 17, 2003, almost three months before DSM/KISCO submitted its new sales database containing the additional sales.

Sixth, the petitioner claims that the Department, in its May 7, 2003, letter to DSM/KISCO, did not request the additional sales that DSM/KISCO first placed on the record in its May 14, 2003, submission. In its August 11, 2003, letter, DSM/KISCO claimed that it placed the additional sales on the record in order to demonstrate that it had no exports through DKI. However, in that same letter, DSM/KISCO also acknowledged that the Department “did not request DSM/KISCO to submit a new sales database, nor did it request DSM/KISCO to look for or report any previously unreported sales made by DSM/KISCO directly to DKA.” The petitioner argues that the Department, in its May 7, 2003, letter, asked DSM/KISCO to explain only whether DKI had any involvement in the U.S. sales process, and that the demonstration of DKI’s involvement could have been satisfied by “copies of paperwork such as a commercial invoice, an entry summary, or a statement by the Customs broker.” The petitioner also asserts that the second question asked by the Department in its May 7, 2003, letter, to verify that all sales through DKI are included in the sales data set submitted to the Department, did not request the reporting of additional unreported sales. The petitioner states that after the deadline for submitting new factual information, an interested party may only respond to the Department’s inquiries. Because the Department did not make a specific request for additional direct sales, the new sales listing was untimely.

Seventh, the petitioner contends that DSM/KISCO’s argument that it timely submitted the additional sales to the record in rebuttal to information placed on the record by the Department is a misinterpretation of 19 C.F.R. § 351.301(c)(1). The petitioner notes that 19 C.F.R. § 351.301(c)(1) allows a party to respond with new factual information only when an “interested party” places factual information on the record. According to the petitioner, section 771(9) of the Act does not include the Department in the definition of an “interested party.” Thus, the petitioner asserts that DSM/KISCO does not have the right to place new information on the record in response to new factual information issued by the Department.

Eighth, the petitioner notes that DSM/KISCO included the additional sales in its September 9, 2003, sales reconciliation package. The petitioner contends that the Department cannot allow DSM/KISCO to use the reconciliation of sales as a way to submit new factual information to the record. DSM/KISCO claims that it was necessary to include the additional sales in order to reconcile its U.S. sales to its financial statements. However, the petitioner argues that the Department’s questionnaire requests a respondent to reconcile only the sales already reported. The reconciliation is not intended to permit the reporting of new sales. Because the Department had deemed DSM/KISCO’s revised sales listing as untimely and removed them from the record (as of August 6,

2003), the petitioner argues that these sales did not exist on the record, and DSM/KISCO should not have been reconciling them to its financial statements. Moreover, the petitioner argues that the untimely inclusion of a complete sales listing (including items such as VCOM, TCOM, packing expenses, etc.) as part of a sales reconciliation has nothing to do with the reconciliation. Finally, the petitioner argues that if the Department allows a respondent to use its sales reconciliation, which is typically submitted just prior to verification or the preliminary results, as a way to reported new U.S. sales, the petitioner will be denied the opportunity to comment and participate in the process of reviewing factual information.

In its rebuttal brief, DSM/KISCO states that it placed its arguments regarding the additional sales contained in its May 14, 2003, submission before the Department in its June 2, 2003, August 11, 2003, and August 12, 2003 submissions, while the petitioner made its arguments to the Department in its June 2, 2003, and June 23, 2003, submissions. DSM/KISCO claims that the Department thoroughly reviewed all of these arguments before issuing its preliminary results. Moreover, DSM/KISCO contends that both parties were given an opportunity to meet with senior Department officials regarding this topic. Therefore, DSM/KISCO asserts that the issue was fully vetted prior to the Preliminary Results. The respondent believes that the petitioner was not denied due process, and that there is no basis for revisiting this issue.

Department's Position:

We agree with the respondent. The Department released to DSM/KISCO the results of our customs data query on May 7, 2003. As indicated by our letter, we were concerned that the results of the customs data query provided evidence that DSM/KISCO had, contrary to its assertions, failed to report its U.S. sales of rebar exported through DKI. In its May 14, 2003 submission, DSM/KISCO reiterated its previous statements that it did not sell rebar to the United States through DKI, and attributed the inclusion of DKI in the results of the customs data query as resulting from errors made by DKA and its customs broker. In addition, the respondent included additional sales in a revised sales listing, even though the Department did not request that DSM/KISCO report a new U.S. sales database.

The United States Court of Appeals for the Federal Circuit (CAFC) has held that the “basic purpose of the statute: ...{is} determining current margins as accurately as possible.” Rhone-Poulenc, Inc. v. U.S., 899 F.2d 1185, 1191 (Fed. Cir. 1990). Although the Department initially rejected the respondent's additional sales as untimely filed factual information on August 6, 2003, the arguments contained in DSM/KISCO's August 11 and 12, 2003, submissions, and our subsequent analysis, confirmed the nature and extent of DSM/KISCO's error. Given that the basic purpose of the statute is to determine current margins as accurately as possible, and that there was sufficient time before the preliminary results and before verification for analyzing the additional sales information, the Department utilized its discretion and accepted the additional sales back onto the record for use in the Preliminary Results.

The customs data query listed DKI as the manufacturer under Manufacturer ID field for 19 observations. In our analysis, we compared the date of shipment and quantity entered from the customs data query for these 19 observations with the U.S. sales contained in the respondent's December 16, 2002, March 7, 2003, and May 14, 2003, U.S. sales listings. We found that 15 of the 19 observations listed on the query as being manufactured by DKI were, in fact, reported in both of the sales listings submitted by the respondent before May 14, 2003. However, four of the 19 observations were not included in the respondent's first two databases. Thus, DSM/KISCO failed to report these four observations, which listed DKI as the manufacturer, until its May 14, 2003, sales listing. See Memorandum from Richard Johns, Case Analyst, to the File, "Analysis of DSM's Sales," dated April 5, 2004 (Sales Analysis Memorandum). Since 15 of 19 observations listed on the customs data query as being manufactured by DKI were reported to the Department in DSM's first two databases, the Department concluded that its initial concern that DSM/KISCO had omitted sales of subject merchandise made through DKI was incorrect.

The second problem raised by the results of the customs data query was that the total quantity reported by DSM/KISCO in its March 7, 2003, submission was only two-thirds of the total entered quantity of subject merchandise from the customs query. DSM/KISCO explained in its August 11 and 12, 2003, submissions that the reason it failed to report a significant amount of its U.S. sales was because company personnel were confused as to whether its sales should be reported according to the date of sale or entry date. In our analysis, we compared the respondent's December 16, 2002, U.S. sales database with its March 7, 2003, U.S. sales database and found that they were identical, except that DSM/KISCO removed 16 sales from the December 16, 2002, database that had a date of sale before the POR. See Sales Analysis Memorandum. We then compared the March 7, 2003, U.S. sales database with the May 14, 2003, U.S. sales database and found that the two are identical except that the May 14, 2003, sales listing included the 16 sales removed from the December 16, 2002, sales listing, in addition to 36 previously unreported U.S. sales. As with the 16 sales removed from the original sales submission, these 36 sales also had a date of sale before the POR. Thus, we found that all of the additional sales that DSM/KISCO reported in its May 14, 2003, U.S. sales listing had a date of sale before the POR. See Sales Analysis Memorandum. Since the total quantity from the May 14, 2003, sales listing exactly matches the total entered quantity from the customs data query, all of the 52 sales with a date of sale before the POR actually entered during the POR. For these reasons, we concluded that our analysis corroborated the claim made by DSM/KISCO that company personnel were confused over the sales reporting called for by the questionnaire.

While it is mathematically correct that the difference in the reported sales quantity between DSM/KISCO's March 7, 2003, and May 14, 2003, submission is one-third of the total U.S. sales quantity entered during the POR, this calculation distorts the true number of the respondent's unreported sales. DSM/KISCO reported 52 more sales in its May 14, 2003, sales listing than it did in its March 7, 2003, database. However, 16 of these sales were reported in the December 16, 2003, U.S. sales database. Therefore, DSM/KISCO included only 36 previously unreported U.S. sales in its

May 14, 2003, database. The quantity of these 36 U.S. sales is approximately one-fourth of the total quantity entered during the POR. Even though failing to report 25 percent of U.S. sales is less than the 33 percent cited numerous times by the petitioner, the Department still considers it a serious and significant error to omit 25 percent of total U.S. sales in the first two sales databases. However, the Department has concluded that DSM/KISCO's August 11, 2003, and August 12, 2003 letters supported the acceptance of new factual information.

Comment 7: Whether the Department can retroactively confer timely status

The petitioner believes that the Department erred in preliminarily accepting DSM/KISCO's additional U.S. sales. The petitioner states that there is no provision in the statute or the regulations for the retroactive conferral of "timeliness" to factual information that was previously deemed untimely. The petitioner also believes that due to this action, it has not been allowed due process, because the Department forced it to remove comments on this information from the record subsequent to deeming the information untimely, but then reversed its decision without reinstating the petitioner's comments on the record.

In its rebuttal brief, DSM/KISCO did not address this issue.

Department's Position:

We disagree with the petitioner. As previously noted, the Department has the discretion to place information on the record if it finds there is an appropriate reason for doing so. In this case, our analysis of DSM/KISCO's sales databases confirmed the nature and extent of DSM/KISCO's error in failing to report a large number of U.S. sales. Given that the basic purpose of the statute is to determine current margins as accurately as possible, and that there was sufficient time before the preliminary results for analyzing the additional sales information, the Department utilized its discretion and accepted the additional sales back onto the record for use in the Preliminary Results.

Further, the petitioner is not correct in its assertion that it has been denied due process. The petitioner placed its arguments regarding these additional sales before the Department in its May 27, 2003, and June 20, 2003, submissions. Further, on June 12, 2003, the petitioners had an *ex parte* meeting with the acting Deputy Assistant Secretary for Group II of Import Administration to discuss its arguments on this topic. See Memorandum from Richard Johns, International Trade Compliance Analyst, to the File, "Meeting With Counsel for Petitioners," dated June 18, 2003. The petitioner is correct that the Department requested that it submit a redacted version of its May 27, 2003, and June 20, 2003, submissions. However, the petitioner was free to resubmit its arguments regarding these sales onto the record in its case brief. In fact, the petitioner did submit extensive argument regarding these sales in its case brief. For this reason, we find that the petitioner was not deprived of its due process.

Recommendation

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

Agree _____

Disagree _____

Let's Discuss _____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

Date