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Administrative Review
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DATE:	June 4, 2012
MEMORANDUM TO:	Paul Piquado Assistant Secretary for Import Administration
FROM:	Gary Taverman Senior Advisor for Antidumping and Countervailing Duty Operations
SUBJECT:	Issues and Decision Memorandum for the 2009-2010 Administrative Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea

Summary

We have analyzed the case and rebuttal briefs of interested parties in the 2009-2010 administrative review of the antidumping duty order on circular welded non-alloy steel pipe ("CWP") from the Republic of Korea ("Korea"). As a result of our analysis, we have made changes with respect to the dumping margin calculations. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

HYSCO ISSUES AND SEAH ISSUES

Comment 1: Whether to Eliminate the Zeroing Methodology in the Final Results

WHEATLAND TUBE COMPANY AND U.S. STEEL ISSUES

Comment 2: Whether the Department Should Use the Purchase Order Date for HYSCO's U.S. Date of Sale

U.S. STEEL ISSUES

Comment 3: Whether to Use the Invoice Date for SeAH's U.S. Date of Sale
Comment 4: Whether to Recalculate SeAH's U.S. Credit Expense

WHEATLAND TUBE COMPANY ISSUES

Comment 5: Whether to Include Bad Debt in SeAH's U.S. Indirect Selling Expenses
Comment 6: Whether to Increase SeAH's Reported Costs to Include An Unreconciled Amount

Comment 7: Whether to Disallow Any Offset to SeAH's Reported Costs for Inventory Valuation Gains
Comment 8: Whether to Base the Major Input Adjustment for SeAH's Hot-Rolled Steel Purchases on Comparisons of Identical Specifications

Background

On December 7, 2011, the Department of Commerce (the "Department") published the preliminary results of the administrative review of the antidumping duty order on CWP from Korea, covering the period November 1, 2009, through October 31, 2010.[1] The administrative review covers two producers/exporters of the subject merchandise to the United States: Hyundai HYSCO ("HYSCO") and SeAH Steel Corporation ("SeAH").

Following the *Preliminary Results*, the Department requested and received additional information on the dates of HYSCO's and SeAH's U.S. sales. Specifically, we sent supplemental questionnaires to HYSCO and SeAH on January 20, 2012, and January 27, 2012, respectively, and we received timely responses on February 3, 2012, and February 22, 2012, respectively.

On February 15, 2012, the Department published in the *Federal Register* an extension of the time limit for the completion of the final results of this review until no later than June 4, 2012, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), and 19 CFR 351.213(h)(2).[2]

We received case briefs from Wheatland Tube Company ("Wheatland"), United States Steel Corporation ("U.S. Steel"), HYSCO, and SeAH on March 14, 2012. On March 22, 2012, U.S. Steel, Wheatland, Allied Tube and Conduit and TMK IPSCO, SeAH, and HYSCO submitted rebuttal briefs. On January 6, 2012, Wheatland requested a hearing, but withdrew its request on April 5, 2012. Thus, no hearing was held.

CHANGES SINCE THE PRELIMINARY RESULTS

The following changes have been made to the margin calculations since the *Preliminary Results*:

1. SeAH's U.S. credit expenses have been recalculated to include the period from the date of shipment until the date of payment as opposed to the date of invoice to the date of payment in accordance with our practice. We have also recalculated the adjustment for foreign inventory carrying costs to avoid double counting the time period between the date of shipment and the invoice date.

2. SeAH's reported cost of manufacturing has been revised to eliminate the inventory valuation adjustment. For additional details, *see* Memorandum to Neal M. Halper, Director of Office of

[1] *See Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Preliminary Results of the Antidumping Duty Administrative Review*, 76 FR 76369 (December 7, 2011) ("*Preliminary Results*")
[2] *See Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Extension of the Final Results of the Antidumping Duty Administrative Review*, 77 FR 8808 (February 15, 2012).

Accounting, "Cost of Production and Constructed Value Calculation Adjustments for the Final Results - SeAH Steel Corporation," dated June 4, 2012.

DISCUSSION OF THE ISSUES

Comment 1: Whether to Eliminate the Zeroing Methodology in the Final Results

HYSCO and SeAH request that the Department not use the zeroing methodology for the final results of this review. HYSCO and SeAH explain that the U.S. Court of Appeals for the Federal Circuit ("CAFC") held in *JTEKT Corporation v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) (*JTEKT*), and *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) (*Dongbu*), that the Department's interpretations of section 771(35) of the Act to end the use of the zeroing methodology in investigations and to use the zeroing methodology in reviews is unreasonable. SeAH states that the CAFC in *Dongbu* requires that the Department explain how section 771(35) of the Act supports these two different interpretations, one for investigations and another for reviews. SeAH also explains that the Department decided recently in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (Feb. 14, 2012) (*Final Modification for Reviews*), to end the use of the zeroing methodology in administrative reviews for which the date of the publication of the preliminary results is after April 16, 2012. SeAH contends that, with these developments, there is no longer a legal justification for the Department to continue to use the zeroing methodology in this review. HYSCO argues that, although the *Final Modification for Reviews* applies only to preliminary results issued after April 16, 2012, and provides additional changes to the Department's calculation methodology, the *Final Modification for Reviews* recognizes that the current practice of zeroing in administrative reviews does not comply with the United States' international obligations.

SeAH claims that the statutory interpretation of "zeroing" is a question of the proper interpretation of section 771(35) of the Act. SeAH explains that section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." SeAH contends that section 771(35)(B) of the Act directs the Department to calculate the "weighted average dumping margin" by dividing the "aggregate dumping margins" by the "aggregate export prices and constructed export prices." SeAH explains that the statute does not use the term "zeroing" and does not refer to "offsets" for "negative" comparison results. According to SeAH, the statute directs the Department to calculate (1) dumping margins by determining the amount by which the normal value (NV) exceeds the U.S. price and to calculate (2) the weighted-average dumping margin using the aggregate of these dumping margins.

According to SeAH, the issue of "zeroing" concerns the interpretation of these statutory provisions in situations in which the NV is lower than the U.S. price. SeAH maintains that there have been two approaches to this issue: the "non-numerical" method and the "mathematical" method. SeAH explains that under the "non-numerical" method, when the NV is less than the U.S. price, the NV does not exceed the U.S. price at all, and, therefore, the "dumping margin" is equal to zero. SeAH continues to explain that, in the "mathematical" method, the concept of negative numbers is included. SeAH contends that, under the "mathematical" approach, when the NV is less than the U.S. price, it is legitimate to say that the NV "exceeds" the U.S. price by a negative amount. SeAH asserts that the courts have taken the position that either of these interpretations of the word "exceed" in section 771(35) of the Act is permissible and, therefore, have upheld the Department's position that the term "exceed" in section 731(35)(A) of the Act may be interpreted with a "non-numerical" approach.

SeAH claims that, if the Department had adhered to the "non-numerical" approach consistently in both investigations and administrative reviews, the Court of International Trade ("CIT") and the CAFC would have upheld the Department's calculations based on such approach. SeAH contends that, by ceasing the use of the zeroing methodology in investigations but continuing the use of zeroing in pending reviews for which the preliminary results will be issued on or before April 16, 2012, and then ending the use of the zeroing methodology in reviews subsequent to April 16, 2012, the Department is applying a different interpretation of the term "exceed" in section 771(35)(A) of the Act in investigations and reviews. SeAH claims that the Department has identified nothing in the statute that suggests that Congress intended the word "exceed" to have one meaning in reviews for which a preliminary decision was issued before April 16, 2012, and a different meaning for investigations and reviews with preliminary results issued after April 16, 2012.

Finally, SeAH maintains that the CIT's recent decision in *Union Steel v. United States*, Consol. Court No. 11-00083, Slip Op. 12-24 (Feb. 27, 2012) (*Union Steel*), in which the CIT upheld the Department's use of zeroing despite the CAFC decisions in *Dongbu* and *JTEKT*, was based on an acceptance of the Department's claims that the statute envisions different purposes for investigations and reviews, and that the relevant statutory language had to be interpreted one way in investigations and a different way in reviews. SeAH asserts that, since the Department has now conceded that zeroing is not needed in reviews to achieve the statutory purpose (at least reviews with preliminary results after April 16, 2012), the logic of the CIT's decision collapses.

HYSCO contends that the Department should not employ its practice of zeroing for the final results of this review. Citing, *inter alia*, *United States – Continued Existence and Application of Zeroing Methodology, Report of the Appellate Body*, WT/DS350/AB/R(Feb. 4, 2009), HYSCO explains that the World Trade Organization's ("WTO")'s Dispute Settlement Body has consistently held that the Department's practice of zeroing in administrative reviews is inconsistent with the WTO Antidumping Agreement. HYSCO explains further that in response to an adverse WTO Appellate Body ruling, the Department eliminated its practice of zeroing in investigations in *Antidumping Proceedings: Calculation of the Weighted-Averaged Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006) (*Final Modification for Investigations*).

HYSCO contends that the Department recognizes that the current practice of "zeroing" in administrative reviews does not comply with the United States' international obligations. HYSCO argues that the Department should permit negative comparison results to offset positive comparison results consistent with the United States' international obligations, the CAFC's recent decisions, and the Department's own stated intention to eliminate the use of zeroing in administrative reviews.

Allied Tube and Conduit ("Allied Tube"), TMK IPSCO ("TMK"), U.S. Steel, and Wheatland assert that the Department properly used zeroing to calculate the weighted-average dumping margin for each respondent and that it should continue to do so for the final results. According to U.S. Steel and Wheatland, the courts have repeatedly upheld the Department's use of zeroing in administrative reviews as a reasonable construction of the statute. U.S. Steel and Wheatland state that the respondents' claim that *Dongbu* and *JTEKT* require a different result is incorrect.

Wheatland contends that the Department has determined that *Dongbu* and *JTEKT* do not require a change in methodology for administrative reviews. U.S. Steel contends that the Department has responded to the CAFC's concerns in *Dongbu* and *JTEKT* with a complete explanation that it is eminently reasonable to interpret section 771(35) of the Act to permit zeroing in administrative reviews when using the average-to-transaction comparison methodology while at the same time permitting the use of offsetting in investigations when using the average-to-average comparison methodology. U.S. Steel claims that the CIT has recently upheld in *Union Steel* the Department's use of zeroing in administrative reviews when using the average-to-transaction comparison methodology because the Department fully satisfied the CAFC's requirements in *Dongbu* and *JTEKT* with its demonstration of how the different interpretations of section 771(35) of the Act are based on the differences inherent in the different statutory comparison methodologies. According to U.S. Steel, in reaching its conclusion in *Union Steel*, the CIT emphasized that the statute is silent with respect to zeroing. U.S. Steel states that the CIT found in *Union Steel* that the CAFC has not read the term "exceeds" in section 771(35) of the Act to mandate anything and that the term "exceeds" cannot properly be relied on to argue that the statute mandates non-zeroing. U.S. Steel states further that the CIT found in *Union Steel* that the inherent differences between the comparison methodology used in antidumping investigations versus the comparison methodology used in administrative reviews were sufficient to permit different approaches regarding zeroing. U.S. Steel asserts that the CIT concluded in *Union Steel* that "when it comes to reviews, which are intended to more accurately reflect commercial reality," the Department is permitted to engage in zeroing in order to "unmask dumping behavior in a way that is not necessary at the investigation stage."

U.S. Steel claims that the Department decided to end the use of the zeroing methodology in 2007 in order to address adverse WTO dispute settlement reports that pertained to zeroing in investigations using the average-to-average comparison methodology. U.S. Steel maintains that this modification was adopted in accordance with section 123(g) of the Uruguay Round Agreements Act (URAA) and the *Final Modification for Investigations* expressly stated that the Department would continue to use zeroing in all other situations.

U.S. Steel maintains that the Department has fully demonstrated the correctness of its interpretation of section 771(35) of the Act to permit zeroing in the context of administrative reviews using the average-to-transaction comparison methodology, and at the same time to permit offsetting in the context of investigations using the average-to-average comparison methodology. U.S. Steel asserts that both the average-to-average comparison methodology and the average-to-transaction comparison methodology are comparison methodologies used to determine dumping margins pursuant to the statute in section 777A(d) of the Act. As the Department has explained, unlike the average-to-transaction comparison methodology, the average-to-average comparison methodology involves an element of offsetting. Therefore, U.S.

Steel maintains that the Department's different interpretations of section 771(35) of the Act to sanction zeroing in administrative reviews using the average-to-transaction comparison methodology but not in investigations using the average-to-average comparison methodology are reasonable because they account for inherent differences between these different comparisons methodologies in section 777A(d) of the Act.

U.S. Steel contends that, contrary to assertions by SeAH and HYSCO, the Department is not prohibited from adopting differing interpretations of the same statutory term, such as permitting zeroing in an administrative review using the average-to-transaction comparison methodology and at the same time permitting offsetting in the context of investigations using the average-to-average comparison methodology. Citing *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 864 (1984), and *FAG Kugelfischer Georg Schafer AG v. United States*, 332 F.3d 1370, 1373 (Fed. Cir. 2003), U.S. Steel claims that it is well recognized that the Department may properly interpret the same statutory provision or term differently depending on the context.

Finally, U.S. Steel disagrees with the assertion made by HYSCO and SeAH that the *Final Modification for Reviews* calls into question the reasonableness of the Department's different interpretations of the same statutory term. U.S. Steel also disagrees with HYSCO's assertion that the *Final Modification for Reviews* indicates that the Department recognizes that zeroing in administrative reviews does not comply with the United States' international obligations. According to U.S. Steel, the Department claimed in its *JTEKT* remand redetermination that the inherent differences in investigations and reviews are sufficient to permit different approaches, not that such differences mandate different calculation methodologies.

U.S. Steel explains that the *Final Modification for Reviews* only allows the Department to offset in conjunction with the average-to-average comparison methodology and not the average-to-transaction comparison methodology. U.S. Steel asserts that this does not change the Department's analysis with regard to zeroing in administrative reviews that use the average-to-transaction comparison methodology. Likewise, U.S. Steel explains that this modification will apply only to reviews where the preliminary results are issued more than 60 days after the publication of the *Final Modification for Reviews*.

Wheatland claims that SeAH's argument that there is no justification for inconsistent interpretations of the statute in pending and future reviews is premised upon a fundamental misunderstanding of the *Final Modification for Reviews*. According to Wheatland, even with the *Final Modification for Reviews*, the Department will continue to interpret the statute to (1) provide offsets for non-dumped comparisons (*i.e.*, without zeroing) when using the average-to-average comparison methodology and (2) continue to use the zeroing methodology when using the average-to-transaction comparison methodology. Wheatland explains that the real change is that, whereas the Department had normally applied the average-to-transaction comparison methodology in reviews with preliminary results issued on or before April 16, 2012, in the future it will normally apply the average-to-average comparison methodology in reviews. Wheatland contends that, to the extent there is a different interpretation of the word "exceeds" applied in pending and future reviews, it is solely the result of switching from the average-to-transaction comparison methodology to the average-to-average comparison methodology. Wheatland maintains that the CIT has found in *Union Steel* that it is reasonable to interpret the word "exceeds" differently when applying different calculation methodologies because the average-to-transaction comparison methodology (which had been the default methodology for use in reviews) was intended to "unmask dumping." Citing *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008), Wheatland explains that Congress was aware that the average-to-average comparison methodology "could mask certain types of dumping," such as where an exporter sells "at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions" and that Congress addressed the problem by allowing the Department to apply the average-to-transaction comparison methodology in those situations to "unmask dumping."

Wheatland refutes HYSCO's argument that zeroing has been found by the WTO Appellate Body to be inconsistent with U.S. obligations under the Antidumping Agreement. Citing, *e.g., Timken Co. v. United States*, 354 F.3d. 1334, 1344-45 (Fed. Cir. 2004) (*Timken*), Wheatland explains that the WTO Appellate Body rulings are not binding interpretations of U.S. law and the Department is prohibited by statute from changing its practice in response to such a ruling except through the procedures set forth in section 123(g) of the URAA, 19 U.S.C. 3533(g). Wheatland states that the Department implemented the adverse ruling by issuing the *Final Modification for Reviews*, which applies only to future reviews. Wheatland states that the Department may not go beyond the *Final Modification for Reviews* and eliminate zeroing in this review.

Allied Tube and TMK contend that the use of negative comparison results for the final results of this review violates the plain language of the statute. According to Allied Tube and TMK, the CIT in *Union Steel* recently upheld the exclusion of negative comparison from the calculation of assessments and security deposits in administrative reviews, despite the Department's use of negative comparison results in investigations in accordance with section 771(35)(B) of the Act. Allied Tube and TMK claim that the CIT stated in *Union Steel* that "the court takes no position as to whether Commerce may forego zeroing in reviews going forward, in average-to-transaction or average-to-average comparisons. The court holds that the methodology at issue here is permissible, not that any particular methodology is required." Allied Tube and TMK identify three statutory provisions that explicitly prohibit the use of negative comparison results for the determination of antidumping duty assessments because the use of negative comparison results violates the plain language of the statute: section 736(a)(1) of the Act which states that the Department must direct "customs officials to assess an antidumping duty *equal to* the amount by which the normal value of the merchandise exceeds the export price," section 751(a)(2) of the Act which states that, for the purpose of determining the antidumping duty assessment, the Department "shall determine the (i) normal value and export price (or constructed export price) of *each entry* of the subject merchandise, and (ii) *the dumping margin for each such entry*" and that "the determination under this paragraph shall be the basis for the assessment of countervailing or antidumping duties on entries," and section 777A(d) of the Act, which states that the calculation of a dumping margin in an administrative review involves "comparing the export price or constructed export price of individual transactions to the weighted average price of sales of the foreign like product."

Allied Tube and TMK argue that section 736(a)(1) of the Act requires the Department to assess an antidumping duty "equal to" the amount by which the NV of the merchandise exceeds the export price ("EP"). Allied Tube and TMK contend that, although these provisions require an assessment "equal to the amount by which the normal value of the merchandise exceeds the export price" (meaning only the positive comparison results), the WTO-mandated methodology adopted by the Department in its *Final Modification for Reviews*, and advocated by SeAH and HYSCO for the current review, "determines assessments by subtracting negative margins from positive margins in the numerator of the 19 U.S.C. §1677(35)(B) weighted-average dumping margin," rather than retaining only positive comparison results, as required by U.S. law.

Allied Tube and TMK explain that the Department's *Final Modification for Reviews* offset methodology results in an amount less than the statutorily required amount "equal to the amount by which the normal value of the merchandise exceeds the export price" (*i.e.*, only positive comparison results), because the offset methodology subtracts the amount of the negative comparison results from the amount "equal to the amount by which the normal value of the merchandise exceeds the export price," which are the positive margins.

Allied Tube and TMK contend that section 751(a)(2) of the Act requires that antidumping duty assessments and cash deposits are based on "entry-specific" determinations of EP and dumping margins, but the methodology published in the *Final Modification for Reviews* and advocated by SeAH and HYSCO for the final results does not involve entry-specific determinations of EP or entry-specific dumping margins. Specifically, Allied Tube and TMK state that the *Final Modification for Reviews* states that for reviews with preliminary results after April 16, 2012, the Department will "calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average comparison in reviews, paralleling the WTO-compliant methodology that the Department applies in original investigations." According to Allied Tube and TMK, an entry-by-entry determination of dumping margins is required by the explicit language of the statute. Allied Tube and TMK contend that no U.S. court has ever stated that section 751(a)(2) of the Act does not mandate an entry-by-entry determination of dumping margins as the Department states, although many CIT and CAFC cases have stated that section 751(a)(2) of the Act does mandate an entry-by-entry determination of dumping margins. In addition, Allied Tube and TMK claim that the average-to-average comparison methodology in reviews, as identified in the *Final Modification for Reviews,* does not involve a comparison of the EP for a specific U.S. entry of the subject merchandise with the NV of such merchandise. According to Allied Tube and TMK, the methodology in the *Final Modification for Reviews* does not compute a comparison result for each entry in accordance with section 771(35)(A) of the Act, and then does not remove or otherwise exclude the negative comparison result for each entry from the numerator in accordance with section 771(35)(B) of the Act.

Finally, Allied Tube and TMK contend that the methodology in *Final Modification for Reviews* violates section 777A of the Act by eliminating from consideration the only comparison of NV to EP specified by the statute involving a comparison of individual transactions to the weighted-average price of sales of the foreign like product. According to Allied Tube and TMK, section 777A(d) of the Act states that the determination of less-than-fair-value sales for an administrative review involves comparing EP or constructed export price ("CEP") of individual transactions to the weighted-average price of sales of the foreign like product. Despite this, Allied Tube and TMK assert that the *Final Modification for Reviews* states that it is not necessary to calculate transaction/entry specific dumping margins for reviews.

Department's Position:

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise" (emphasis added). 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.

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

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

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

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

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

The difference between "zeroing" and "offsetting" reflects the ambiguity the Federal Circuit has found in the word "exceeds" as used in section 771(35)(A) of the Act. *See Timken*, 354 F.3d at 1341-45. The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.[3] For decades, the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison methodology used. In view of the statutory ambiguity, on multiple occasions, both the Federal Circuit and other courts squarely addressed the reasonableness of the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.[4] In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law."[5] The Federal Circuit explained in *Timken* that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem

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

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

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

of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value."[6] As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.[7]

In 2005, a panel of the WTO Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.[8] The initial WTO Dispute Settlement Body Panel Report was limited to the Department's use of zeroing in average-to-average comparisons in antidumping duty investigations.[9] The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the URAA (19 U.S.C. § 3533(f), (g)) (Section 123).[10] Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities' arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.[11]

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the Federal Circuit recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.[12] Moreover, in *Corus I*, the Federal Circuit acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations.[13] In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the Federal Circuit found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations.[14] With this modification, the Department's

6 *See Timken*, 354 F.3d at 1343.
7 *See, e.g., Timken*, 354 F.3d at 1343; *Corus I*, 395 F.3d at 1343; *Corus II*¸ 502 F.3d at 1370, 1375; and *NSK*, 510 F.3d at 1375.
8 *See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R (October 31, 2005) ("*EC-Zeroing Panel*").
9 *See EC-Zeroing Panel*, WT/DS294/R.
10 *See Final Modification for Investigations*, 71 FR at 77722; and *Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification*, 72 FR 3783 (June 26, 2007).
11 *See EC-Zeroing Panel* at 7.284, 7.291.
12 *See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United Stat*es, 603 F.3d 928, 934 (Fed. Cir. 2010).
13 *See Corus I*, 395 F.3d at 1347.
14 *See Final Modification for Investigations*, 71 FR at 77722.

interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other contexts, including average-to-transaction comparisons in administrative reviews. *Id.*, 71 FR at 77724.

The Federal Circuit subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing in other contexts, including when making average-to-transaction comparisons in administrative reviews.[15] In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations.[16] The Federal Circuit's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type.[17] The Federal Circuit acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist.[18] The Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing.[19] In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that "{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist."[20]

We disagree with the respondents that *Dongbu* and *JTEKT* require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in *Dongbu* and *JTEKT* did not overturn prior Federal Circuit decisions affirming zeroing in administrative reviews, including *SKF*, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain

[15] *See U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1362-63 (Fed. Cir. 2010)
[16] *Id.*, at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping).
[17] *Id.*., at 1361-63.
[18] *Id.*., at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); *see also* section 777A(d)(1)(B) of the Act.
[19] *See U.S. Steel Corp.*, 621 F.3d at 1363.
[20] *Id.* (emphasis added).

investigations.[21] Unlike the determinations examined in *Dongbu* and *JTEKT*, the Department, in these final results, provides additional explanation for its changed interpretation of the statute subsequent to the *Final Modification for Investigations* – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in *Dongbu*, *JTEKT*, *U.S. Steel*, and *SKF*.

The Department's interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons in antidumping duty investigations,[22] the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with the average-to-average comparison methodology was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the Uruguay Round Agreements Act for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison. The Department's *Final Modification for Investigations* to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affirmed by the Federal Circuit in several prior, precedential opinions upholding the use of zeroing in the average-to-transaction comparison methodology in administrative reviews as a reasonable interpretation of section 771(35) of the Act.[23] In the *Final Modification for Investigations*, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the *Charming Betsy* doctrine, to comply with certain adverse WTO dispute settlement findings.[24] Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain weighted-average dumping margin calculations, the *Charming Betsy* doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of the average-to-average comparison methodology so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither Section 123 nor the *Charming Betsy* doctrine requires

[21] *See SKF v. United States*, 630 F.3d 1365 (Fed. Cir. 2011)("*SKF*").
[22] The *Final Modification for Reviews* adopts the average-to-average comparison methodology as the default method for administrative reviews. However, this modification is not applicable to these final results.
[23] *See, e.g.*, *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1382 (Fed. Cir. 2008); *NSK*, 510 F.3d at 1379-80; *Corus II*, 502 F.3d at 1372-75; *Timken*, 354 F.3d at 1343.
[24] According to *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The principle emanating from the quoted passage, known as the *Charming Betsy* doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of the Department's legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to the average-to-average comparison methodology – is not subject to judicial review. *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992). These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently when applying the average-to-average comparison methodology in antidumping duty investigations relative to all other contexts.

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

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparison methodology to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using the average-to-average comparison methodology, *see, e.g.*, section 777A(d)(1)(A)(i) of the Act, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average EP or CEP of transactions within one averaging group to an average NV for the comparable sales of the foreign like product. In calculating the average EP or CEP, the Department averages all prices, both high and low, within each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable sales of the foreign like product. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale in the United States because the Department does not examine dumping on the basis of individual U.S. transactions, but rather performs its analysis "on average" for the transactions within an averaging group where higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department's average-to-average comparison methodology, which permits EPs above NV to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying the average-to-transaction comparison methodology, *see, e.g.*, section 777A(d)(2) of the Act, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. transactions. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable sales of the foreign like product. This comparison methodology yields results specific to each individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the POR. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.[25] Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word "exceeds" in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the "aggregate dumping margin" within the meaning of section 771(35)(B) of the Act. Furthermore, as noted above, whether a given transaction has a positive or negative comparison result, the value of that export transaction is included in the aggregation of the EP and CEP values for the denominator of the weighted-average dumping margin.

Put simply, the Department interprets the application of the average-to-average comparison methodology to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison methodology implicitly permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation of the weighted-average dumping margin where average-to-average comparison results are aggregated, such that offsets are (1) implicitly granted when calculating average export prices and (2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using the average-to-average comparison methodology does not extend to situations where the Department is using the average-to-transaction comparison methodology because no offsetting is inherent in the average-to-transaction comparison methodology.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average

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

comparison or an average-to-transaction comparison. Accordingly, the Department's interpretations of section 771(35) of the Act to permit zeroing in the average-to-transaction comparison methodology, as in this administrative review, and to permit offsetting in the average-to-average-comparison methodology reasonably account for the differences inherent in distinct comparison methodologies.

Regarding HYSCO's claim that other WTO reports found the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.[26] As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department's discretion in applying the statute.[27] Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports.[28]

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

Finally, we disagree with the arguments raised by SeAH, HYSCO, Allied Tube, and TMK concerning the applicability of the *Final Modification for Reviews*. On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. *See Final Modification for Reviews*. The *Final Modification for Reviews* makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the *Final Modification for Reviews* does not apply here. Moreover, the Department's practice is consistent with U.S. law and has been upheld by the courts.[29]

Comment 2: Whether The Department Should Use Purchase Order Date for HYSCO's U.S. Date of Sale

U.S. Steel and Wheatland (collectively, "Petitioners") argue that the Department should revise its *Preliminary Results* by rejecting the shipment date as the date of sale for HYSCO's U.S. sales and relying instead on the purchase order date. Petitioners assert that the material terms of sale did not change after the purchase order date. In support, they point to the U.S. sales packets submitted by HYSCO which show that the *total* quantity ordered and the *total* quantity actually

[26] *See Corus I*, 395 F.3d at 1347-49; accord *Corus II*, 502 F.3d at 1375; and *NSK*, 510 F.3d 1375.
[27] *See* 19 USC 3538(b)(4) (implementation of WTO reports is discretionary).
[28] *See* 19 USC 3533(g).
[29] *See*, *e.g.*, *Koyo 2008*, 551 F.3d at 1290-91; *NSK*, 510 F.3d at 1379-80; *Corus II*, 502 F.3d at 1375; *Corus I*, 395 F.3d at 1347; *Timken*, 354 F.3d at 1341-45; *PAM*, 265 F. Supp. 2d at 1370; *Bowe Passat*, 926 F. Supp. at 1149-50; *Serampore*, 675 F. Supp. at 1360-61.

shipped were well within the contractually specified quantity tolerance listed in HYSCO's written order and contract documents. Petitioners also point to language in the offer sheets stating that the delivery allowance pertains to "total amount and quantity," which, in their view, indicates that the tolerance is determined on a total order basis. Consequently, Petitioners allege that the record evidence demonstrates that quantity tolerances are on a total order basis, not a line-item basis as HYSCO has claimed.

Petitioners charge that HYSCO has failed to provide a single negotiation document that references a line-item quantity tolerance range. Wheatland maintains that each of the declarations made by HYSCO's affiliates and U.S. customers regarding how quantity can change between order and shipment date on a line-item basis is contradicted by the actual sales documents that were executed during the POR.[30] According to Petitioners, HYSCO's standard business practice is to enter into a sales agreement by using formal written contracts and purchase orders. Thus, they contend, any changes to the material terms of sale should require written documentation. Petitioners also allege that printouts from HYSCO's accounting system cannot be considered part of the negotiation between buyer and seller and, therefore, have no bearing on the terms of sale.

Petitioners take issue with HYSCO's statement that its affiliates must seek permission from the customer before shipping any line-item order outside of the stated tolerance. Even though HYSCO has submitted examples demonstrating changes in sales quantities for certain transactions, Petitioners claim that HYSCO has not submitted any correspondence granting permission to make these material changes to sales.

Petitioners note that HYSCO's quantity line-item changes are rare and do not demonstrate that the material terms of sale change frequently enough on U.S. sales so as to give both buyers and sellers any expectation that the final terms will differ from those agreed to in the contract.[31] Petitioners cite to *Stainless Steel Sheet and Strip in Coils from Korea* where the Department found that changes were not sufficiently common to conclude that the initial agreements should not be considered in establishing the material terms of sale.[32] Petitioners also note that changes in quantity identified by HYSCO are immaterial. Petitioners claim that HYSCO's failure to demonstrate that it received permission to alter the terms of sale for those sales with quantity changes outside the tolerance on a line-item basis demonstrates that these changes are immaterial.

Finally, Wheatland claims that the Department should continue using the purchase order date as the U.S. date of sale as this has been its past practice,[33] and there is no evidence that the U.S.

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[30] Wheatland notes that none of the individuals signing the unsworn statements declared, under the penalty of perjury, that the information was true and correct.

[31] *See* HYSCO's Third Supplemental Response, Exhibit 7A.

[32] *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the Republic of Korea,* 64 FR 30664, 30679 (June 8, 1999) ("*Stainless Steel Sheet and Strip in Coils from Korea").*

[33] *See Notice of Preliminary Results of Antidumping Duty Administrative Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 68 FR 68331, 68333 (December 8, 2003) unchanged in *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 69 FR

sales process has changed since prior reviews.

HYSCO asserts that the Department's practice is to use invoice date as the date of sale, unless the Department is satisfied that a different date better reflects the date on which all the material terms of sale are finalized. HYSCO further asserts that the Department has a long-established practice that it will not consider the date of sale to occur subsequent to shipment from the factory because once the merchandise is shipped the material terms of sale are presumed to have been established.

HYSCO claims that record evidence demonstrates that its sales are made subject to a standard line-item tolerance and that shipments outside this tolerance constitute a change in the material terms of sale. Specifically, HYSCO states that the record shows that its sales are coded into its accounting system on a line-item tolerance basis; it has shipped merchandise to customers in excess of the established line-item tolerances; company personnel have attested that HYSCO's sales are made on a line-item tolerance basis; HYSCO's customers have provided declarations stating that their purchases from HYSCO and its subsidiaries are made on a line-item tolerance basis; and HYSCO requires customer's approval if its shipments are outside the tolerances.

Regarding Petitioners' concerns related to the "total amount and quantity" language in the offer sheets, HYSCO asserts that it conducts its business with the understanding that this statement reflects a stated tolerance on a line-item basis. HYSCO asserts that references to higher tolerances in certain documents reflect standard boilerplate language and are not enforced or followed by its subsidiaries or customers.[34] HYSCO rejects Petitioners' claim that the content of HYSCO's accounting system is immaterial to the issue of whether HYSCO's sales are made on a line-item tolerance basis. According to HYSCO, its accounting system is highly relevant to its standard operating procedures: it clearly demonstrates how the company sets quantity tolerances on a line-item basis and explains the actions required by company personnel in contacting the customer if an individual shipment falls outside a specific quantity tolerance. HYSCO cites to *Certain Cut-to-Length Carbon Steel Plate from Romania,*[35] in which the Department considered the evidence on record, including affidavits from U.S. customers.

While Wheatland claims that given HYSCO's business practice, any changes to HYSCO's sales must surely be in writing, HYSCO responds that this is incorrect. HYSCO communicates with its customers via telephone and not every change to a shipment is memorialized in writing.

Finally, HYSCO argues that the Department's use of the purchase order date in prior reviews is not dispositive in this review. Specifically, HYSCO argues that the Department is not "required to employ the same date of sale in an ongoing review as it had relied on in a previous review."[36] This is particularly true, according to HYSCO, because its most recent review was a decade ago.

32492 (June 10, 2004); *Circular Welded Non-Alloy Steel Pipe from Korea: Final Results of Antidumping Duty Administrative Review*, 63 FR 32833 (June 16, 1998) .

[34] *See* HYSCO's February 22, 2012 Supplemental Questionnaire Response at 3.

[35] *See Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania***,** 72 FR 6522 (February 12, 2007).

[36] *See Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement in the Antidumping Duty Order*, 74 FR 22885 (May 15, 2009), and accompanying Issues and Decision Memorandum at Comment 2.

Since that time, the Department's regulations changed and invoice date became the presumptive date of sale.[37] Moreover, HYSCO has participated in other proceedings since that review and the Department has determined that the date of shipment was the appropriate date of sale.[38]

Department's Position:

The Department "normally will use the date of invoice" as the date of sale, unless "the Secretary is satisfied that a different date better reflects the date on which the exporter or producer established the material terms of sale."[39] Moreover, the Department has a longstanding practice of finding that, where invoice date is the presumptive date of sale, but shipment date precedes invoice date, shipment date should be used as date of sale.[40]

Consistent with our regulations and practice, we have continued to use HYSCO's shipment date as the date of sale for its U.S. transactions in these final results. The record evidence shows the material terms of sale can and do change up until shipment date.[41] HYSCO has provided several examples of changes to quantity between order and invoice that were above the tolerance stated on the order on a line-item basis. While Petitioners reference language from the offer sheets pertaining to tolerances on a total quantity basis, these cited offer sheets are between HYSCO and its affiliated customers. The language on orders with the unaffiliated U.S. customers does not specify whether tolerances are on a total order or total line-item basis. Therefore, we have examined other information on the record regarding the delivery tolerance. Specifically, HYSCO has shown that when it codes each sale into its accounting system, it codes the quantity tolerance next to each line item. HYSCO has shown how it can and does change the tolerance for specific line items within the order. In addition, HYSCO has claimed that even though the internal offer sheets refer to total quantity, the company intends that to mean total quantity of each line item. Indeed, HYSCO has provided us with communications between it and its affiliate seeking approval to ship more than the tolerance amount for a specific line item on a specific invoice.[42]

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[37] *See Antidumping and Countervailing Duties: Final Rule*, 62 FR 27926, 27411 (May 19, 1997).

[38] *See Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Notice of Final Results of the 2009-2010 Administrative Review and Revocation, in Part*, 77 FR 14501 (March 12, 2012), and accompanying Issues and Decision Memorandum at Comment 4; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Administrative Review*, 75 FR 13490 (March 22, 2010), and accompanying Issues and Decision Memorandum at Comment 5; *Preliminary Determination of Sales at Less Than Fair Value and Postponement of the Final Determination: Certain Circular Welded Carbon Quality Steel Line Pipe from the Republic of Korea*, 73 FR 66019 (November 6, 2008).

[39] *See* 19 CFR 351.401(i)

[40] *See Stainless Steel Bar From Japan: Final Results of Antidumping Administrative Review*, 65 FR 13717 (March 14, 2000) ("*Stainless Steel Bar from Japan*") and accompanying Issues and Decision Memorandum at Comment 1; *see Amended Notice of Preliminary Results of Antidumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin from Italy*, 73 FR 54557 (September 22, 2008) ("*Resin from Italy*"); *see also Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Administrative Review and Partial Rescission*, 74 FR 11082 (March 16, 2009) ("*CORE 14*") and accompanying Issues and Decision Memorandum at Comment 18; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Administrative Review*, 75 FR 13490 (March 22, 2010) ("*CORE 15*") and accompanying Issues and Decision Memorandum at Comment 5.

[41] *See* HYSCO's Third Supplemental Questionnaire Response at Exhibit 7A.

[42] *Id.* at Exhibit 6.

While Petitioners argue that the line-item quantity changes are immaterial and infrequent, the precedent they cite for ignoring such changes is outdated. More recently, in *Stainless Steel Sheet and Strip in Coils from Taiwan,*[43] the Department found that even if quantity changes were rare, the CIT has stated that "the existence of …one sale beyond contractual tolerance levels suggests sufficient possibility of changes in material terms of sale."

Lastly, the Department disagrees with Wheatland that use of the purchase order date as the U.S. date of sale in prior reviews dictates the same in the current review. While we strive for consistency, each review must be decided based on the record evidence in that review. As we stated in *Certain Hot-Rolled Steel from Thailand,*[44] the "Department's date of sale determinations in previous segments of a proceeding are not binding on subsequent segments of the proceeding."

Comment 3: Whether the Department Should Use the Invoice Date for SeAH's U.S. Date of Sale

U.S. Steel claims that the Department should treat the invoice date, not the shipment date, as the date of sale for SeAH's U.S. sales. U.S. Steel notes that invoice date is the presumptive date of sale in the Department's regulations and a party must show that its proposed date (*e.g.*, shipment date) better reflects the date on which the material terms of sale are established.[45] According to U.S. Steel, SeAH has not met this burden.

U.S. Steel explains that SeAH sold the subject merchandise in the United States through its U.S. affiliate, Pusan Pipe America ("PPA"), which acted as a reseller of the merchandise. U.S. Steel contends that there are only two documents which reflect the terms of sale agreed upon between SeAH and the unaffiliated U.S. customer—the U.S. customer's purchase order and the invoice issued by PPA to the U.S. customer. U.S. Steel contends that, while SeAH claimed that the price was fixed by the customer's order and there were no cases during the review period in which the price stated on PPA's invoice differed from the price on the order, SeAH's claims are contradicted by the record evidence. As evidence, U.S. Steel points to two sets of sample sales documents.[46] U.S. Steel asserts that these documents demonstrate that PPA's invoice is the only document on the record that establishes the final material terms of sale between SeAH and the U.S. customer. U.S. Steel asserts that where, as here, the evidence shows that the material terms of sale are not established until after the shipment date, the Department has consistently determined the date of sale to be after the shipment date.[47]

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[43] *See Stainless Steel Sheet and Strip in Coils From Taiwan: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 7519 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 4.

[44] *See Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement in the Antidumping Duty Order*, 74 FR 22885 (May 15, 2009), and accompanying Issues and Decision Memorandum at Comment 2.

[45] *See* 19 CFR 351.401(i). *See also Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 45611 (September 3, 2009) and accompanying Issues and Decision Memorandum at Comment 2.

[46] *See* SeAH's Section A Response at Appendix A-4-B and SeAH's September 9, 2009 Supplemental Questionnaire Response at Appendix SA-4.

[47] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Light-Walled Rectangular Pipe and Tube From the Republic of Korea*, 73 FR 5794, 5798 (January

U.S. Steel contends that the Department cannot use the shipment date as the date of sale based solely on the fact that the shipment date preceded the invoice date. U.S. Steel contends further that there is no evidence to show that the material terms of sale were fixed at the time of shipment. U.S. Steel asserts that a convention of using the shipment date as the date of sale simply because it precedes the invoice date is plainly erroneous and inconsistent with the Department's regulations. According to U.S. Steel, using the shipment date as the date of sale wherever it precedes the invoice date would supplant the date of shipment for the date of invoice as the presumptive date of sale in contravention to the regulations. U.S. Steel asserts that in the Preamble to the regulations, the Department rejected using the shipment date as the presumed date of sale over invoice date because, based on its experience, the date of shipment rarely represent the date on which the material terms of sale are established.[48] U.S. Steel asserts the material terms can and do change after the shipment date, and the record evidence here is proof of this. U.S. Steel argues that the courts have made clear that an agency must follow its own regulations and the failure to do so will result in the reversal of the agency's decisions.[49] U.S. Steel asserts that because SeAH has not rebutted the regulatory presumption of invoice date, the Department would be violating its own regulations by using shipment date. Finally, U.S. Steel notes, the SAA, which is an authoritative expression of the proper interpretation of the statute, states that date of sale is the date on which the material terms of sale are established.[50] U.S. Steel concludes that since nothing about date of shipment sets the terms of sale, the Department has no authority to automatically choose the shipment date as the date of sale without regard to whether there is satisfactory evidence.

SeAH asserts that the material terms of its sales to its U.S. customers are fixed at the time the merchandise is shipped from Korea because the quantity, price, and shipment terms do not change after that date.[51]

SeAH addresses the specific sales identified by U.S. Steel.[52] For one sale, SeAH claims that there was a price change after the initial order. SeAH asserts that this price change occurred before shipment and was related to a change in the method of shipment. Specifically, SeAH asserts that the bill of lading for this sale indicates the merchandise was shipped in a container, which is not the usual shipment method for U.S. sales and which carries an additional cost.[53] SeAH claims it would not have shipped the merchandise by container if it did not have the customer's agreement to cover the increased cost. SeAH notes that the additional charge is

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31, 2008) ("*Pipe and Tube from Korea*") unchanged in the *Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from the Republic of Korea*, 73 FR 35655 (June 24, 2008).; *Carbon and Alloy Steel Wire Rod From Trinidad and Tobago: Final Results of Antidumping Duty Administrative Review*, 72 FR 62824 (November 7, 2007) ("*Wire Rod from Trinidad and Tobago 2007*").

[48] *See Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27348-9 (May 19, 1997).

[49] *See, e.g., Torrington Co. v United States*, 82 F.3d 1039, 1049-50 (Fed. Cir. 1996), *Amanda Foods v. United States*, Court No. 09-00431, slip op. 11-155 (CIT December 14, 2011)

[50] *See* Uruguay Rounds Agreements Act, Statement of Administrative Action, H.R. 5110 (H.R. Doc. No. 103-316), reprinted in 1994 U.S.C.C.A.N 4040, 4153 ("SAA").

[51] *See* SeAH's September 9, 2011 Supplemental Questionnaire Response at 10-11. *See also* SeAH's Section A Questionnaire Response, at 27-28 and 30.

[52] *See* SeAH's Section A Questionnaire Responses at Appendix A-4-B and SeAH's September 9, 2011, Supplemental Questionnaire Response at Appendix SA-4-B.

[53] SeAH references the ocean freight for this sale being higher than for most other U.S. sales.

indicated on the commercial invoice between SeAH and PPA, and the bill of lading is dated five days later. Thus, SeAH indicates, the additional charge for shipping in a container was fixed at the time the merchandise was shipped.[54] Regarding the second sale cited by U.S. Steel, SeAH asserts that the purchase order referred to in U.S. Steel's argument is the order from PPA to SeAH—not the order from the U.S. customer to PPA. Therefore, SeAH explains, it is not surprising that the purchase order price identified by U.S. Steel does not match the price that PPA charged its customers in its invoices, since PPA generally charges its customer more than SeAH charges PPA. SeAH claims it did not have a price change or a delivery terms change, and the differences noted by U.S. Steel are the result of U.S. Steel's factual error. Therefore, SeAH asserts that U.S. Steel's argument must be rejected.

Department's Position:

As noted in response to the previous comment, the Department has a longstanding practice of finding that, where the invoice date is the presumptive date of sale, but the shipment date precedes the invoice date, the shipment date should be used as date of sale.[55] U.S. Steel is correct that the Department has on occasion used a date of sale after shipment date. Specifically, when record evidence demonstrates that the material terms have changed after shipment (are not finalized until the commercial invoice is issued), we have used invoice date as date of sale.[56] However, that is not the case here. Instead, record evidence shows the material terms of sale were set by the shipment date. With respect to the second sale cited by U.S. Steel, we agree with SeAH that U.S. Steel was comparing the order from PPA to SeAH to the invoice from PPA to the unaffiliated U.S. customer.[57] This is an incorrect comparison. Similarly, record evidence supports SeAH's claim regarding the price change on the first sale.[58]

Comment 4: Whether the Department Should Recalculate SeAH's U.S. Credit Expense

U.S. Steel asserts that the Department should recalculate SeAH's credit expense for its U.S. sales. U.S. Steel maintains that under the Department's practice, the credit period begins as soon as the merchandise is shipped to the U.S. customer,[59] which in this case is shipment from Korea.

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[54] SeAH notes that because questions were not raised earlier about the additional containerization charge, the documents submitted to the Department do not include the correspondence from PPA to its customer showing the customer's agreement, but is clear the customer agreed to pay because the additional charge is reflected in the invoice.

[55] *See Stainless Steel Bar From Japan* and accompanying Issues and Decision Memorandum at Comment 1; *see Resin from Italy*; *see also CORE 14* and accompanying Issues and Decision Memorandum at Comment 18; *CORE 15* and accompanying Issues and Decision Memorandum at Comment 5.

[56] In *Pipe and Tube from Korea*, 73 FR at 5798, we stated that the material terms of sale were not finalized until issuance of the commercial invoice. In *Wire Rod from Trinidad and Tobago 2007* at Comment 1, we found that the essential terms of sale can change after shipment, the customer acknowledgement allows for other changes to the terms of sale, and the respondent redirected a shipment of subject merchandise from one customer to another prior to invoicing.

[57] *See* SeAH's Section A Questionnaire Responses at Appendix A-4-B and SeAH's September 9, 2011, Supplemental Questionnaire Response at Appendix SA-4-B.

[58] *See* SeAH's Section A Questionnaire Responses at Appendix A-4-B.

[59] *See, e.g., Notice of Final Results of the Tenth Administrative Review and New Shipper Review of the Antidumping Duty Order on Certain Corrosion – Resistant Carbon Steel Flat Products from the Republic of Korea*, 70 FR 12443 (March 14, 2005) and accompanying Issues and Decision Memorandum at Comment 13 ("*CORE from Korea*"); *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69

In contravention of this, SeAH chose PPA's invoice date as the starting point of the credit period.[60] U.S. Steel notes that invoicing occurs after the merchandise arrives at the U.S. port and asserts that by choosing the date of invoice as the starting point for calculating the credit period, SeAH significantly and inappropriately reduced the credit period.

SeAH contends that U.S. Steel's assertion is contrary to basic contract law, under which a seller is not entitled to payment until it has transferred title to the merchandise to the purchaser.[61] Therefore, SeAH explains, PPA was not entitled to payment from its customer until title transferred to the customer, and the credit period did not begin to run until PPA issued its invoice to the customer. SeAH asserts that up until the time title transfers, the seller retains the option of holding onto the merchandise and perhaps diverting it elsewhere, but once title passes to the buyer, it is impractical for the seller to retake the goods, and the seller's only recourse is to collect payment from the buyer.

SeAH explains that although its U.S. sales were shipped directly from Korea to the U.S. port of entry, where the unaffiliated customer took possession, the sale is not, as a matter of contract law a direct sale from SeAH to the customer. SeAH asserts title is transferred to PPA when the goods reach the United States, and PPA holds title while the goods enter the United States. According to SeAH, as a legal and accounting matter, the merchandise was part of PPA's inventory during that period, and title did not transfer to the unaffiliated customer until after customs clearance was complete and PPA's invoice was issued. Thus, SeAH concludes, the customer was not obligated to pay PPA until the invoice was issued. SeAH asserts that the transfer of title and the customer's payment obligation is the same for these sales as it would have been if the merchandise had been stored at PPA's facilities in the United States prior to sale.

SeAH claims that U.S. Steel's methodology is contrary to statutory provisions concerning the permissible adjustments to CEP because this methodology would involve deduction of an expense incurred outside of the United States. SeAH contends that the 1995 Uruguay Round amendments to the U.S. antidumping statute clarified that adjustments to CEP are limited to expenses associated with economic activities in the United States. SeAH notes that deduction of the imputed interest for the period that the merchandise was in transit from Korea to the United States, before title had transferred to the buyer, would not be consistent with the statutory limitation on the adjustments to CEP. SeAH claims that the Department has consistently held that the imputed inventory carrying costs for the time prior to the arrival of the merchandise in the United States, when the merchandise is "on the water," cannot be deducted from CEP.[62] SeAH contends that the Department's past decisions therefore establish that the imputed financing costs prior to the time the merchandise arrives in the United States are not expenses associated with economic activities in the United States that can be deducted from CEP under the statute.

FR 19153 (April 12, 2004) and accompanying Issues and Decision Memorandum at Comment 4 ("*SSWR from Korea*").

[60] *See* SeAH's Section C Questionnaire Response at 35.

[61] SeAH cites to the Uniform Commercial Code at Section 2-310 and 2-705(a).

[62] *See Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review*, 68 FR 69996 (December 16, 2003) and accompanying Issues and Decision Memorandum at Comment 10.

SeAH acknowledges that some past decisions have attempted to distinguish imputed inventory carrying costs from imputed credit costs, on the grounds that the credit expense must be calculated from the date of shipment of the merchandise to the customer.[63] SeAH claims these decisions ignore the legal nature of the transfers that occur. SeAH asserts that when a foreign exporter ships merchandise in a back-to-back transaction through an affiliated U.S. importer, the exporter's shipment is, as a matter of law, made to the U.S. affiliate, because the bill of lading, which conveys title to the merchandise, is delivered to the affiliated U.S. importer.[64] SeAH contends that, in legal terms, merchandise is not shipped to the customer until the affiliated U.S. importer issues its invoice and title is transferred to the customer.[65] SeAH alleges that there are two distinct shipments: one shipment occurs when the exporter transfers title to the importer, and the second occurs when the importer transfers title to its customer. Therefore, SeAH explains, because shipments to the customer do not occur until the importer transfers title, the Department's calculation of the credit period for its U.S. sales should begin with that date and not with the date that shipment was made from the exporter to the affiliated importer.

Finally, SeAH contends that U.S. Steel's methodology would lead to inconsistent calculations for U.S. sales depending solely on whether the merchandise was held in the physical inventory of the U.S. sales affiliate, in contravention of the holding by the CAFC in the *AK Steel* case.[66] SeAH asserts that in *AK Steel* the CAFC clarified that sales made in the United States by a U.S. affiliate of the exporter had to be classified as CEP sales. SeAH claims that under U.S. Steel's credit calculation proposal, the treatment of imputed financing costs for the time the merchandise was on the water would not depend on whether the sale was EP or CEP, but instead on whether the merchandise was stored in the United States before delivery to the customer. Thus, it would create a distinction between sales made from inventory held in the United States and sales made through back-to-back transactions that the CAFC has held is not consistent with the statute. Thus, SeAH concludes, the Department should reject U.S. Steel's argument.

Department's Position:

The Department's practice is to calculate credit expenses based upon the date the merchandise was shipped to the unaffiliated customer to the date on which the customer paid for the merchandise.[67] As we explained in *Wire Rod from Trinidad and Tobago 2005*, "Credit expense is the interest expense incurred (or interest revenue forgone) between shipment of merchandise to the customer and receipt of payment from the customer. Inventory carrying costs are the interest expense incurred (or interest revenue forgone) between the time the merchandise leaves the production line at the factory to the time the goods are shipped to the first unaffiliated

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[63] *See, e.g., Certain Hot-Rolled Carbon Steel Products from India: Notice of Final Results of Antidumping Duty Administrative Review*, 73 FR 31961 (June 5, 2008) and accompanying Issues and Decision Memorandum at Comment 3.

[64] SeAH claims that, according to the Uniform Commercial Code at section 1-201(16), the bill of lading is a document of title.

[65] SeAH claims that, according to the Uniform Commercial Code at section 2-504, shipment to a buyer occurs when the goods are put in the possession of a carrier for delivery to the buyer.

[66] *See AK Steel Corporation v. United States*, 226 F.3d 1361, 1365, 1375 (Fed. Cir. 2000) ("*AK Steel*").

[67] *See CORE from Korea* and accompanying Issues and Decision Memorandum at Comment 13 and *SSWR from Korea* and accompanying Issues and Decision Memorandum at Comment 4.

customer."[68]

In *Wire Rod from Trinidad and Tobago 2005*, we further stated that it is our intention, in CEP cases, where the merchandise does not enter the inventory of a U.S. affiliate in the United States, to calculate the credit period from the time the merchandise leaves the port in the foreign country to the date of payment.[69] As SeAH indicates above, its U.S. sales are not sold from its U.S. affiliate's warehouse.[70] While the merchandise may temporarily enter the U.S. affiliate's inventory on paper while the affiliate is clearing the merchandise through customs, the U.S. affiliate does not maintain any subject merchandise inventory available for sale in the United States.[71] Moreover, SeAH produced the merchandise it sold in the United States to order. Thus any merchandise that is in the affiliate's inventory while clearing through customs is already on its way to specific U.S. customers. As such, the credit expenses SeAH incurred relate to sales destined to specific, unaffiliated U.S. customers. Under these circumstances, our normal practice is to calculate credit expenses from the date the merchandise is first shipped to the unaffiliated customer to the date of payment by that customer.[72]

We do not find that the *AK Steel* case is applicable to this issue because *AK Steel* does not address the issue of U.S. imputed credit expenses. *AK Steel* addresses the issue of whether sales transactions made in the United States between a respondent's U.S. sales affiliate and unaffiliated U.S. customers constitute CEP sales even when the shipment of subject merchandise was made directly from the respondent to the unaffiliated U.S. customers. The CAFC's decision in *AK Steel* does not challenge in any way our use of the difference between the date of payment and the date of shipment in the calculation of U.S. imputed credit expenses. *AK Steel* does not overturn our practice of using the difference between the payment date and the shipment date in the calculation of U.S. imputed credit expenses.

SeAH included the time between shipment from Korea and invoice to the final U.S. customer in the domestic inventory carrying costs for its U.S. sales. In order not to double count this amount, we have removed it from SeAH's domestic inventory carrying costs.

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68 *See Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, 70 FR 12648 (March 15, 2005) and accompanying Issues and Decision Memorandum at Comment 6 ("*Wire Rod from Trinidad and Tobago 2005*").
69 *Id.*
70 *See* SeAH's Section C Questionnaire Response at 30.
71 *See* SeAH's Section A Questionnaire Response at 27-28.
72 *See Wire Rod from Trinidad and Tobago 2005* and accompanying Issues and Decision Memorandum at Comment 6 and *Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review*, 72 FR 18204 (April 11, 2007) and accompanying Issues and Decision Memorandum at Comment 3 ("*Hot-Rolled from Romania*"). An exception to this practice can occur where the material terms of sale are not set until after date of shipment. For example, in *Wire Rod from Trinidad and Tobago 2007* and accompanying Issues and Decision Memorandum, Methodology for Calculating Imputed Expenses for CEP Sales, we calculated credit expense from date of invoice, rather than date of shipment, because the material terms of sale were not set until date of invoice, which was after shipment in that case. *See also Mittal Steel Point Lisas Ltds. v. United States*, 502 F. Supp. 2d 1345 (CIT 2007). However, in the instant review, we have determined that the material terms of sale are set by shipment date.

Comment 5: Whether Bad Debt Should Be Included in SeAH's U.S. Indirect Selling Expenses

Wheatland claims bad debt should be included in SeAH's U.S. indirect selling expenses. In support, Wheatland cites to the Department's treatment of bad debt in *Shrimp from India*, and in past reviews of the instant proceeding.[73]

SeAH asserts that Wheatland wants the Department to include a portion of PPA's allowance for doubtful accounts in indirect selling expenses because the Department previously included a portion of PPA's provision for doubtful accounts in indirect selling expenses. SeAH contends that Wheatland's argument reflects a misunderstanding of the difference between balance sheet amounts (such as assets) and income statement amounts (such as expenses). SeAH claims that the notes to PPA's financial statements do describe an "allowance for doubtful" accounts in 2009 and 2010. However, according to SeAH, the notes indicate that this allowance is an element of the accounts receivable reported in PPA's balance sheet, meaning that the allowance is part of an asset account and is not an expense.[74] SeAH asserts that the allowance is the sum of "provisions" recorded by PPA as expenses over a period of several years.

SeAH maintains PPA did record a provision in 2008, which increased the allowance for doubtful accounts (or reserve for bad debt). SeAH contends that in 2009 and 2010, however, PPA's management concluded that the existing allowance was sufficient and, therefore, no provision for bad debt was recorded in those years, and PPA did not recognize bad debt expenses for 2009 or 2010. Therefore, SeAH asserts, there is nothing for the Department to include in PPA's indirect selling expenses for this review. SeAH asserts that treating a reserve (or balance sheet allowance account) as an indirect selling expense in each year it remains on the balance sheet would double- (or triple- or more) count the expense. SeAH concludes that Wheatland's contention should be dismissed.

Department's Position:

It is the Department's practice to include a respondent's provision for bad debt in indirect selling expenses.[75] However, we agree with SeAH that PPA did not record any provisions for bad debt in the POR. As SeAH notes, Wheatland has pointed to balance sheet accounts, and including the entire allowance for doubtful accounts would result in overstating the bad debt expenses actually recognized by PPA. We see no evidence that PPA increased the allowance for doubtful accounts

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[73] *See Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Notice of Revocation of Order in Part*, 75 FR 41813 (July 19, 2010) and accompanying Issues and Decision Memorandum at Comment 5 and n. 14 ("*Shrimp from India*").

[74] *See* SeAH's November 7, 2011 Supplemental Questionnaire Response, Appendix SSC-5-G at 1.

[75] *See Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review* 75 FR 34980 (June 21, 2010) and accompanying Issues and Decision Memorandum at Comment 4, *Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 70 FR 73444 (December 12, 2005) and accompanying Issues and Decision Memorandum at Comment 3; *see also Notice of Final Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Brazil*, 70 FR 7243 (February 11, 2005) and accompanying Issues and Decision Memorandum at Comment 6.

in the POR.[76] *See* SeAH's Final Sales Calculation Memo.[77]

Comment 6: Whether to Increase SeAH's Reported Costs to Include An Unreconciled Amount

Wheatland argues that the Department should increase SeAH's reported costs to include the unassigned variance shown in the cost reconciliation at Appendix SSD-13, of SeAH's October 13, 2011 second supplemental section D questionnaire response ("2SDQR"). According to Wheatland, it is the Department's practice to increase a respondent's reported costs to include an unreconciled amount.[78]

SeAH agrees with Wheatland that the unassigned variance should be included in cost of manufacturing ("COM") but argues that it is already included in the reported costs. SeAH notes that the calculation of the adjustment for this variance was submitted at Appendix D-12 of SeAH's April 18, 2011 section D questionnaire response ("DQR"). Furthermore, the calculation of the variance for a sample product was submitted at Appendix SD-10 of SeAH's July 25, 2011 supplemental section D questionnaire response ("SDQR"). SeAH adds that because the variance is a negative figure it resulted in a reduction of the reported costs.

Department's Position:

We agree with Wheatland that it is the Department's practice to increase a respondent's reported costs to include an unreconciled amount. However, in this case we do not have an unreconciled amount. Instead, we have an unassigned variance (identified as such in SeAH's books and records) which is included in the reported costs (CVAR field in the cost database at Appendix SD-1 of the SDQR). This variance, as explained by SeAH at page 37 of the DQR, is for material cost differences that are not assigned to individual production orders but instead are recorded directly to cost of goods sold ("COGS"). Since the unassigned variance is already included in the reported costs, for the final results, we have not adjusted SeAH's reported costs.

Comment 7: Whether to Disallow Any Offset to SeAH's Reported Costs for Inventory Valuation Gains

Wheatland argues that the Department should not allow SeAH to use its inventory valuation gains to offset its reported costs because, in a previous review of this order, the Department determined that SeAH's inventory valuation losses should not be included in the reported costs.[79]

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[76] *See* PPA's 2008-2009 and 2009-2010 Financial Statements in SeAH's Section A Questionnaire Response, Appendix A-7-D at 8 and SeAH's July 25, 2011 Supplemental Questionnaire Response, Appendix SD-3-D at 8, respectively

[77] *See* Memorandum from Jennifer Meek to the File, Re: Final Results Calculation Memorandum, dated June 4, 2012 ("SeAH Final Sales Calculation Memo").

[78] *See Stainless Steel Bar from India: Final Results of the Antidumping Duty Administrative Review, and Revocation of the Order, in Part*, 76 FR 56401, 56402 (September 13, 2011).

[79] *See Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review*, 75 FR 34980 (June 21, 2010) ("*Non-Alloy Steel Pipe from Korea*") and accompanying Issues and Decision Memorandum at Comment 2.

Wheatland adds that, in its responses to the Department,[80] SeAH stated that adjustments for inventory valuation gains and losses were included in its COGS but reduced its COGS to remove the inventory valuation adjustment for 2010.[81] Therefore, Wheatland concludes that for the final results the Department should add the inventory valuation adjustments (both the total POR adjustments and the fiscal year ("FY") finished goods adjustment) back to SeAH's reported costs to ensure that inventory valuation gains do not offset COM.

SeAH argues that the COM it reported to the Department does not include the inventory valuation gains. SeAH notes that, as it demonstrated in the cost reconciliation at Appendix SSD-13 of the 2SDQR, SeAH's FY 2010 COM was obtained by removing the inventory valuation adjustment ("IVA") from SeAH's FY 2010 COGS. SeAH adds that Appendix SSD-13 also demonstrates how the POR COM for the subject merchandise is reconciled to the FY COM, and that none of the reconciling items includes an IVA. As such, SeAH concludes that because the FY COM did not include the IVA neither does the POR COM for the subject merchandise.

Department's Position:

We agree with Wheatland that SeAH's IVA should not be included in the reported costs. When SeAH records its IVA, it records it in a contra inventory account. SeAH does not adjust the individual inventory items' value. When the inventory is used and/or sold it is recorded at the historical cost. Therefore, there is no need to pick up either the loss (as in the 07/08 review) or the gain (as in this review) in the reported costs.[82] Because SeAH records the IVA at the corporate level and not at the cost accounting system level (*see* page 15 of the SDQR), it is necessary to eliminate the IVA from SeAH's cost reconciliation. In addition, as in a previous review of this order, because SeAH's normal accounting records reflect the historical inventory cost the Department has determined that it is not necessary to include the IVA in the reported costs.[83] Contrary to SeAH's assertion that the COM it reported to the Department does not include the inventory valuation gains, SeAH's cost reconciliation at Appendix SSD-13 of the 2SDQR (also at Appendix SD-11-I of the SDQR) clearly shows that SeAH only eliminated the finished goods inventory portion of the FY IVA from the FY COGS. Therefore, part of the IVA still remains in SeAH's total COM for the POR. As such, for the final results, in order to ensure that the POR IVA is not included in SeAH's reported costs we reversed SeAH's FY IVA and removed the net POR IVA from the total POR COM figure used for the reported costs.

Comment 8: Whether to Base the Major Input Adjustment for SeAH's Hot-Rolled Steel Purchases on Comparisons of Identical Specifications

For the *Preliminary Results* we did not make any cost adjustments for SeAH. For the major input analysis, as in previous reviews of this order, we compared the total purchases of carbon-steel hot-rolled coil ("HRC") from affiliated parties to those of unaffiliated parties.

[80] *See* SeAH's DQR at 16. *See* also SeAH's November 9, 2011 third supplemental section D questionnaire response at 2.
[81] *See* SeAH's 2SDQR at Appendix SSD-13.
[82] *See Non-Alloy Steel Pipe from Korea* at Comment 2. *See also Certain Welded Stainless Steel Pipes from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review*, 75 FR 27987 (May 19, 2010) ("*Stainless Steel Pipes from Korea*") and accompanying Issues and Decision Memorandum at Comment 2.
[83] *See Non-Alloy Steel Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 2.

Wheatland argues that the Department should require SeAH to provide the major input chart for each grade and specification of HRC purchased from POSCO (an affiliated supplier) and unaffiliated suppliers, and should conduct the major input analysis based on comparisons of identical HRC specifications. Wheatland states that SeAH instead reported its purchases of HRC from POSCO and unaffiliated suppliers on an aggregate basis.[84] Wheatland considers this to distort the costs because any below-market transfer pricing is masked by differences in the product mix of HRC. According to Wheatland, in a recent stainless steel case the Department determined, on remand, that it should conduct the major input analysis separately for each specification within each grade of steel coil SeAH purchased from POSCO, due to physical and chemical differences among the specifications.[85] Wheatland adds that the Department conducts the major input comparisons using identical products even when the physical characteristics of the finished product do not reflect the differences in the input.[86] Further, Wheatland notes that the Department requested grade-specific HRC purchase information from a respondent in the current review of circular welded carbon steel pipes and tubes from Thailand (A-549-502),[87] and should also do so in this case. Wheatland contends that failure to request more detailed HRC purchase information distorts the major input analysis and leaves the calculation open for significant manipulation.

SeAH states that the HRC purchase information needed to conduct the major input analysis based on comparisons of identical specifications, as suggested by Wheatland, is not part of the record. SeAH argues that the Department should reject Wheatland's argument as untimely because Wheatland does not claim that SeAH failed to provide the HRC purchase information as requested by the Department. In addition, SeAH adds that Wheatland does not state whether it requested, in a timely manner, that the Department collect the relevant HRC purchase information from SeAH.

Department's Position:

We disagree with Wheatland. The facts in the instant case are distinguishable from those in the stainless steel case remand cited by Wheatland. In this case, the major input is hot-rolled carbon-steel coils. We note that differences in grades for stainless steels are entirely different than for carbon steel. Stainless steels are alloy products of which the principal alloying element is chromium. However, a number of additional alloying elements can be added to obtain an assortment of performance characteristics. These additional alloying elements (nickel, molybdenum, *etc.*), in combination with chromium, can significantly affect cost. Carbon steels, which are used to make subject merchandise, do not contain alloy levels of elements and their performance is driven primarily by the level of carbon in the steel. For the subject pipe, there are slight differences in certain elements such as carbon for the different grades of the hot-rolled inputs. However, these differences are inconsequential, and there is a great level of

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[84] *See* SeAH's April 18, 2011 section D questionnaire response at Appendix D-4-D.
[85] *See* Final Results of Redetermination dated September 17, 2010, at 28, Pursuant to Court Remand in *SeAH Steel Corp. v. United States*, Ct. No. 09-00248, slip op. 10-60 (CIT May 19 2010).
[86] *See Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from Indonesia*, 72 FR 60636 (October 25, 2007) ("*Coated Free Sheet Paper from Indonesia*") and accompanying Issues and Decision Memorandum at Comment 4.
[87] *See* Saha Thai Steel Pipe (Public) Co., Ltd.'s December 28, 2011 supplemental section D questionnaire at question 18.c.

interchangeability of hot-rolled inputs used to produce the different grades of pipe. Furthermore, although the CONNUM characteristics for circular welded non-alloy steel pipe include grade, this grade characteristic does not refer to the grade of the HRC, but rather the grade of the finished pipe (*i.e.*, pressure, ordinary standard, structural, or conduit).

We also find Wheatland's reliance on *Coated Free Sheet Paper from Indonesia* to be misplaced. In that case, the evidence on the record demonstrated that the pulp purchased from the respondents' unaffiliated suppliers was not comparable to the pulp purchased from the affiliated suppliers. However, in this case, as noted above, the differences between hot-rolled inputs are inconsequential, and there is a great level of interchangeability of hot-rolled inputs used to produce the different grades of pipe. The petitioner also cites to the current review of circular welded carbon steel pipes and tubes from Thailand (A-549-502), for which the final results have not been published since it is still ongoing. In the Thai pipe case, the respondent demonstrated that cost differences between different grades of hot-rolled inputs were so small as to be immaterial in terms of price,[88] which supports the Department's position in this case.

Therefore, as done in the *Preliminary Results* and previous reviews of this order, we have continued to base our major input analysis on SeAH's total HRC purchases without regard to grade or specification of the coil input.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions. If accepted, we will publish the final results of this review and the final weighted-average dumping margins in the *Federal Register*.

AGREE _________ DISAGREE _________

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Paul Piquado
Assistant Secretary
for Import Administration

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Date

88 *See* Saha Thai Steel Pipe (Public) Co., Ltd.'s January 26, 2012 third supplemental section D questionnaire response at 16. (Public Version)