UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

A-580-868
Investigation
Public Document
AD/CVD/O2: KJ

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 Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea

Summary

We have analyzed the comments of the interested parties in the antidumping duty (AD) investigation of Large Residential Washers (washers) from Korea. As a result of this analysis and based on our findings at verification, we have made changes to the margin calculations for the two participating respondents in this case, LG Electronics, Inc. (LG), and Samsung Electronics Co., Ltd. (Samsung or SEC). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation on which we received comments from parties.

General Issues

1. Scope Exclusion of Smaller Top-Load Washers
2. Request to Exclude Larger-Width Washers from the Scope
3. Targeted Dumping
4. Zeroing in the Average-to-Transaction Method

Company-Specific Issues

LG

5. Rebates
6. Conducting the Sales-Below-Cost Test Based on Level of Trade
7. General and Administrative Expenses
8. Alleged Affiliation of LG and its Input Suppliers
9. Request to Exclude a Certain Home Market Model
10. Unreported Early Payment Discounts
11. Calculation of Profit Rate for Affiliated Logistics Services Provider

12. Treatment of Certain Selling Expenses and Rebates
13. Treatment of Affiliated Retailer's Operating Expenses
14. Adjustment of Marine Insurance Premium Ratio

Samsung

15. Fraud Allegation Against Samsung
16. Request to Apply Adverse Facts Available to Samsung for Its Affiliate's Conduct
17. Alleged Unforeseen Event
18. U.S. Sales Transactions Affected by the Alleged Unforeseen Event
19. Date of Sale for Samsung's Direct Shipment Sales
20. Duty Drawback
21. Adjustment to the Selling, General & Administrative Expenses of Affiliated Suppliers
22. Product Characteristic Coding

Background

On August 3, 2012, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value (LTFV) investigation of washers from Korea. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Large Residential Washers From the Republic of Korea, 77 FR 46391 (August 3, 2012) (Preliminary Determination). The period of investigation (POI) is October 1, 2010, through September 30, 2011.

We invited parties to comment on the preliminary determination. We received comments from the petitioner[1] and the two respondents. The petitioner and both respondents requested a hearing, which was held at the Department on November 14, 2012. Based on our analysis of the comments received, as well as our findings at verification, we have changed the weighted-average margins from those presented in the preliminary determination.

On October 31, 2012, the Department tolled the deadline for the final determination by two days to account for the disruption in services and government closure caused by Hurricane Sandy. Specifically, the Department originally extended the deadline for this final determination until December 16, 2012. As explained in the memorandum from the Assistant Secretary for Import Administration, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 29, through October 30, 2012. Thus, all deadlines in this segment of the proceeding were extended by two days. Accordingly, the revised deadline for the final determination of this investigation is now December 18, 2012.[2]

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[1] The petitioner in this investigation is Whirlpool Corporation.

[2] See Memorandum to the Record from Paul Piquado, AS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Hurricane," dated October 31, 2012.

Margin Calculations

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

LG

- Based on verification findings, we adjusted U.S. rebates reported under REBATE1U to include potentially unreported rebate amounts. In addition, for certain sales for which a damage allowance rebate applied, we reallocated the rebate amount based on the terms of the rebate agreement. See Comment 5.

- We revised the profit rate calculated for LG's affiliated logistics services provider that we used in the Preliminary Determination to recalculate movement expenses incurred on home market sales and foreign inland freight expenses incurred on U.S. sales, in order to estimate the affiliate's costs of providing these services. See Comment 11.

- We reconsidered our Preliminary Determination decision and accepted credit card support expenses (DIRSEL2H) and loyalty point rebates (REBATE8H) as reported, rather than disregarding the expenses, or treating them as indirect selling expenses, respectively. In addition, we treated gift card expenses (REBATE7H) as direct selling expenses, rather than as indirect selling expenses. See Comment 12.

- We adjusted the reported U.S. marine insurance expenses in order to reflect the insurance premium rate on a transfer-price basis rather than on a sale-price basis. See Comment 14.

- We used LG's revised research and development (R&D) expense ratio calculation included in the company's combined general and administrative (G&A)/R&D ratio, as submitted in LG's August 13, 2012 submission of factual information. See Comment 7.

See the memoranda entitled "Final Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc. (collectively, "LG"), dated December 18, 2012, (LG Sales Calculation Memo), and "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – LG Electronics Inc. and LG Electronics USA, Inc," dated December 18, 2012 (LG Cost Calculation Memo), which are incorporated by reference.

Samsung

- We continued to treat the expenses related to Samsung's allegedly unforeseen event as warranty expenses. However, we modified slightly our preliminary calculation because the event expenses affected all U.S. sales, including sales to original equipment manufacturers (OEMs).

- Based on verification findings, we reconsidered our Preliminary Determination decision and allowed Samsung's claimed duty drawback adjustment to U.S. price. See Comment 20.

- We increased Samsung's reported costs to reflect the amount of duties which would have been incurred but for the products' subsequent exportation and the Korean duty-drawback program. See Comment 20.

- Based on our review of Samsung's transactions with affiliated parties, in accordance with section 773(f)(2) of the Act (the transactions disregarded rule), we increased Samsung's reported costs to reflect arm's-length prices. See Comment 21.

  See memoranda entitled "Final Determination Margin Calculation for Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc." (collectively, "Samsung"), dated December 18, 2012, (Samsung Sales Calculation Memo), and "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Samsung Electronics Corporation," dated December 18, 2012 (Samsung Cost Calculation Memo), which are incorporated by reference.

Discussion of the Issues

General Issues

Comment 1: Scope Exclusion of Smaller Top-Load Washers

Prior to the preliminary determinations of the AD investigations of washers from Mexico and Korea, and the countervailing duty (CVD) investigation of washers from Korea, the petitioner requested that the Department exclude smaller top-load washers (i.e., washers with vertical rotational axes and a rated capacity of less than 3.70 ft^3) from the scope of the investigations. Based on the comments received from interested parties and the information provided to the Department by U.S. Customs and Border Protection (CBP), we amended the scope of the AD investigations in the AD preliminary determinations to exclude smaller top-load washers. We subsequently amended the scope of the CVD investigation to exclude this merchandise on July 31, 2012.[3]

LG maintains that the Department improperly modified the scope of these investigations, and should reincorporate smaller top-load washers into the scope of the investigations. In the event that smaller top-load washers continue to be excluded from the scope of the investigations, the Department should calculate LG's normal value using smaller top-load washers for model-matching purposes.

[3] See Large Residential Washers from the Republic of Korea: Amendment to the Scope of the Countervailing Duty Investigation, 77 FR 46715 (August 6, 2012).

LG acknowledges that the Department's standard practice is to provide ample deference to the petitioner with respect to the definition of the product for which it seeks relief during the investigation phase of an AD or CVD proceeding. Nevertheless, LG maintains that there are limits to such deference, and that in this case the Department should reverse its decision to exclude smaller top-load washers from the scope. LG contends that the scope exclusion prevents the Department from calculating an accurate normal value for its home-market sales of foreign like product. Additionally, LG maintains that excluding smaller top-load washers substantially alters the scope of the investigations and raises serious concerns as to whether the International Trade Commission (ITC) made its preliminary injury determination based upon a scope that is significantly different from the revised scope of the investigations. Furthermore, LG argues that the Department should determine that interested parties were deprived of the procedures of notice and comment integrated in AD and CVD laws because the exclusion request was made so late in the proceedings, and suggests that the delay in the petitioner's scope exclusion request could have negative implications on the ITC's final injury determinations.

Moreover, LG argues that, even if smaller top-load washers continue to be excluded from the scope of the investigations in the final determinations, the Department should still use them for model-matching purposes when calculating LG's AD margin. To support the feasibility of using home market sales excluded from the scope of the investigations for margin calculation purposes, LG argues that section 771(16)(B) of the Act does not require merchandise to be of the "same general class or kind" as the merchandise which is subject to the investigation. Accordingly, LG claims that, because section 771(16)(B) only requires merchandise to be <u>similar</u> to subject merchandise in component materials, usability, and commercial value, the Department is not limited by the Act to products that are <u>covered</u> under the scope of the investigation for model-matching purposes. LG maintains that smaller top-load washers meet the requirements of being "like" product under section 771(16)(B) of the Act, as they possess similar component materials, are used for the same purposes as the subject merchandise, and are comparable in commercial value. Moreover, LG asserts that based upon the hierarchy of the product-matching characteristics in the present AD investigations, smaller top-load washers are often the products most similar to the subject merchandise. Therefore, LG asserts that because the Department's practice is to use foreign like product which is the most similar to the subject merchandise in an investigation, and that data for smaller top-load washers has already been reported and verified by the Department, there is no reason that smaller top-load washers should not be used for model-matching purposes.

Finally, LG contends that the Department should not reward what it characterizes as a deliberate attempt on behalf of the petitioner to inflate the margin by excluding a substantial number of washer sales which would otherwise be subject to scope of the investigations.

The petitioner maintains that the Department should reject LG's request to reverse its scope exclusion decision because no overarching reasons have arisen since the preliminary determinations which support reversing the decision, and the petitioner continues not to have an interest in obtaining AD or CVD relief on smaller top-load washers. Moreover, the petitioner argues that LG's claim that the scope exclusion threatens the legitimacy of the investigations is speculative given that the Department has revised the scope language between the ITC's preliminary and final determinations in numerous past cases without hindering the legitimacy of those cases.[4] Additionally, the petitioner claims that, in the event that the smaller top-load washers had been included in the scope of the investigations at the AD preliminary determinations, there would have been a minor or nonexistent difference in the actual margin calculated because LG had only a small volume of U.S. sales of smaller top-load washers during the POI and Samsung had none. Accordingly, the petitioner argues that LG's claim that the scope exclusion substantially altered the present investigations is unsubstantiated, and does not support the reversal of the Department's scope exclusion decision.

Furthermore, the petitioner opposes LG's request to use smaller top-load washers for model-matching purposes in calculating the normal value of LG's home-market sales. The petitioner maintains that LG's attempt to reduce its AD margin by including merchandise which is explicitly excluded from the scope of the investigations is unwarranted and in contravention of the Department's established practice of using foreign like product which meets the definition of the scope when making price comparisons with sales of subject merchandise. Thus, the petitioner argues that LG's proposition that the Department should use merchandise for model-matching purposes which is similar to the subject merchandise, but outside of scope of the investigations, is an unreasonable interpretation of section 771(16)(B) of the Act. The petitioner highlights the fact that an AD margin is calculated by determining the amount in which normal value exceeds the price of subject merchandise,[5] and that subject merchandise is limited to "the class or kind of merchandise which is within the scope of the investigation."[6] Therefore, the petitioner argues it is more reasonable than not for the Department to restrict the universe of foreign like product to merchandise which meets the definition of the scope.

<u>The Department's Position</u>:

We disagree with LG, and for the reasons explained below, have continued to exclude smaller top-load washers from the scope of the investigations in the final determinations.

If the Department and ITC determine in an investigation that the implementation of an AD or CVD order is warranted, one of the purposes of the investigation is to determine that the scope of that order adequately reflects the product(s) for which the domestic industry is seeking relief, and excludes those products for which the petitioner does not seek relief.[7] Therefore, as

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[4] <u>See</u>, <u>e.g.</u>, <u>Narrow Woven Ribbons with Woven Selvedge from Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination</u>, 75 FR 7236, 7240-41 (February 18, 2010); and <u>Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Live Swine From Canada</u>, 69 FR 61639, 61640-41 (October 20, 2004).

[5] <u>See</u> Section 771(35) of the Act.

[6] <u>See</u> Section 771(25) of the Act.

[7] <u>See</u> <u>Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances</u>, 73 FR 33977, 33979 (June 16, 2008) (excluding products which fell within the general scope definition, but for which the petitioner did not seek relief); <u>see</u> <u>also</u> <u>Initiation of Antidumping Duty Investigations: Spring Table Grapes from Chile and Mexico</u>, 66 FR 26831,

acknowledged by LG and the petitioner, the Department's practice is to provide ample deference to the petitioner with respect to the definition of the product(s) for which it seeks relief during the investigation phase of an AD or CVD proceeding.[8]

Additionally, section 732(b)(1) of the Act states that a "petition may be amended at such time, and upon such conditions, as the administering authority . . . may permit."[9] Nevertheless, the Court of International Trade (CIT) has indicated that, at a certain point in an investigation, significant changes to the scope can raise a number of procedural concerns, such as whether or not injury has been or can be properly determined based on a revised scope.[10] As such, in determining the scope of an investigation, the Department must not only focus on whether the language of the scope contains a clear physical description of the products for which the petitioner seeks relief (as well as any exclusions), but also the Department must consider whether the scope language is administrable.

The Department granted the petitioner's request to exclude smaller top-load washers from the scope because, inter alia, the scope modification: (1) consisted of a scope reduction rather than expansion; (2) contained an exclusion that was based on a specific physical characteristic of the products for which the petitioner sought exclusion (i.e., washers with vertical rotational axes and a rated capacity less than 3.70 ft^3); and (3) CBP indicated that the scope exclusion request would be administrable, as the request specifically described the method by which the product would be determined to be out of the scope. We also found it contrary to the intent of AD and CVD laws to include products within the scope for which a petitioner has specifically stated that it does not wish to seek relief.[11]

We disagree with LG that the timing of the petitioner's exclusion request potentially threatens the conduct of future investigations and deprived the parties in the washers investigations of an

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26832-26833 (May 15, 2001) (Spring Table Grapes from Chile).

[8] See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 51788, 51789 (September, 5 2008); Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products From Canada, 67 FR 15539 (April 2, 2002), and accompanying Issues and Decision Memorandum at Scope Issues (stating that the Department possesses the authority to define or clarify the scope of an investigation throughout the investigation); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Outboard Engines from Japan, 69 FR 49863, 49871 (August 12, 2004) (citing Final Determination of Sales at Less Than Fair Value: Certain Carbon Alloy Wire Rod from Japan, 59 FR 5987, 5988-5989 (February 9, 1994) and accompanying Issues and Decision Memorandum at Comment l); and Allegheny Bradford Com. v. United States, 342 F. Supp. 2d 1172, 1187-88 (CIT 2004) (Allegheny) (explaining the deference given to the Department in determining the scope of AD and CVD orders).

[9] See also Section 702(b)(1) of the Act.

[10] See Smith Corona Corp. v. United States, 796 F. Supp. 1532, 1535 (CIT 1992); and Allegheny, 342 F. Supp. 2d at 1187-88.

[11] See Spring Table Grapes from Chile, 66 FR at 26833 (stating the domestic industry is in the best position to identify the imports that they compete against and believe to be unfairly traded).

opportunity to adequately defend their interests. The petitioner submitted its exclusion request before the issuance of any of the preliminary determinations in the washers investigations. Therefore, there was adequate opportunity for LG and the other parties to respond to the exclusion request and provide commentary on whether or not such an exclusion should be granted.[12] Moreover, as noted by the petitioner, the scope may often change during the course of the ITC's investigation without necessarily complicating the ITC's final injury determination. As a result, we have concluded that if the petitioner does not seek relief from imports of smaller top-load washers, then the inclusion of those washers in the scope of the investigations and possible AD and CVD orders does not appear to be warranted.

Furthermore, LG maintains that section 771(16)(B) provides the Department with the discretion to use sales which have been excluded from the scope of the investigations as foreign like product for model-matching purposes. We do not disagree with this assertion. The Court of Appeals for the Federal Circuit (Federal Circuit) has held that section 771(16) of the Act is silent with respect to the methodology that the Department must use in matching sales of subject merchandise with sales of suitable home market sales.[13] Therefore, the Federal Circuit has viewed this silence in the statute as an indication that Congress has afforded the Department with considerable discretion in creating a methodology for identifying foreign like products.[14]

However, we disagree with LG that the Department should deviate from its standard practice in this case and consider merchandise sold in the home market that does not meet the physical descriptions of the scope for purposes of model matching. As acknowledged by both the petitioner and LG, it is the Department's practice to look first to the scope of the proceedings in determining which home market sales, produced and sold by the respondent, fall into the category of foreign like product. After this determination is made, the Department attempts to compare subject merchandise sales to home market sales with the same physical characteristics as the subject merchandise.[15] When it is not possible to make identical product comparisons, the

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[12] See Smith Corona Corp., 796 F. Supp. at 1535 (in which the CIT held that there are various procedural safeguards included in the administration of AD and CVD laws which provide parties with the opportunity to respond and be heard during the course of a proceeding, all which applied in this case).

[13] See SKF USA, Inc. v. United States, 537 F.3d 1373, 1379 (Fed.Cir.2008) (SKF II) (quoting Koyo Seiko Co. v. United States, 66 F.3d 1204, 1209 (Fed.Cir.1995) (Koyo II)).

[14] Id. (citing Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1384 (Fed.Cir.2001) (Pesquera Mares)). In SKF II, the Court reasoned that, under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), a court must accept the Department's reasonable interpretation of a statute when the statute is silent regarding a specific issue, even if the court would have preferred a different interpretation. SKF II, 537 F.3d at 1379 (citing Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed.Cir.1994) (Koyo I)).

[15] See Section 771(16)(A) of the Act; Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Preliminary Results of Antidumping Duty Administrative Review and Rescission in Part, 71 FR 65458, 65461 (November 8, 2006) (unchanged in Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 27802 (May 17, 2007), and the accompanying Issues and Decision Memorandum); and Carbon and Alloy Steel Wire Rod from Trinidad and Tobago: Preliminary Results of Antidumping Duty Administrative Review, 71 FR 65077 (November 7, 2006) (unchanged in Carbon and Alloy Steel Wire Rod from Trinidad and Tobago: Final Results of Antidumping Duty Administrative Review, 72 FR 9922 (March 6, 2007)).

Department will compare merchandise which is physically similar to the merchandise sold in the United States.[16] Moreover, when similar merchandise comparisons are made, the Department will adjust for any physical differences in the merchandise (DIFMER) that affect the prices of the merchandise. The Department generally will not consider merchandise to be similar if the DIFMER adjustment is greater than twenty percent of the total manufacturing cost of the products sold to the United States.

The Department applies this methodology in every investigation and administrative review, so to do as LG suggests, and compare home market sales that do not meet the physical descriptions of the scope with U.S. sales that fall within the scope description would be a substantial departure from our practice. Adopting this procedure would have a significant effect on all future investigations and administrative reviews because respondents essentially would be encouraged to strategically select sales of products, even those outside of the scope, that they believe the Department should use for model-matching purposes, in an effort to increase or decrease AD margins.

In any case, the adoption of such a radical change in methodology is clearly not warranted in this case because LG has reported home market sales of merchandise covered under the scope of the investigations, which can be accurately compared with sales of subject merchandise, and adjusted for any physical differences affecting price. We therefore find no overarching reason to use smaller top-load washers which do not meet the physical descriptions of the merchandise covered by the scope for model-matching purposes. Finally, the motivations of the petitioner in requesting a scope exclusion is not a factor which the Department has been tasked by Congress to consider as part of its analysis. The records of the washers investigations contain no evidence of manipulation on the part of the petitioner, and we otherwise find no reason to question the fact that the petitioner is not requesting relief from the potential harm caused by smaller top-load washers exported from Korea and Mexico. Accordingly, we have continued to exclude smaller top-load washers from Korea and Mexico from the scope of the investigations.

Comment 2: Request to Exclude Larger-Width Washers from the Scope

LG argues that the Department should exclude larger-width washers (i.e., washers with widths of 29 inches or greater) from the scope of the investigations. LG asserts that the Department possesses the inherent authority to revise the scope of an investigation during an ongoing proceeding,[17] and notes that in accordance with section 732(b)(1) of the Act, "a petition may be amended at such time, and upon such conditions as the Department and ITC may permit." Additionally, LG asserts that, while one of the main purposes of AD and CVD laws is to provide relief to industries from unfair trade practices, the Department's practice is to exclude merchandise covered under the scope which the petitioner lacks interest.[18] In light of the fact that neither the

[16] See Section 771(16)(B) of the Act.
[17] See Cellular Mobile Telephones and Subassemblies From Japan; Final Determination of Sales at Less Than Fair Value, 50 FR 45447, 45449 (October 31, 1985).

[18] See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27323 (May 19, 1997).

petitioner nor any U.S. producer manufactures larger-width washers, LG maintains that the petitioner cannot have an actual interest in seeking AD and CVD duty relief on larger-width washers. While LG acknowledges that the petitioner is not required to produce every single permutation of products within the scope,[19] it maintains that larger-width washers are not produced or sold in the United States, and represent a new class of products that are physically different from the other products covered under the scope of the investigations. Furthermore, LG acknowledges that the petitions[20] cover washers up to 32 inches in width. Nevertheless, in response to the petitioner's argument that products are often included in the scope of an investigation because they are similar and competitive with domestic products, LG argues that this line of reasoning is inapplicable to larger-width washers because they were not produced and sold in the United States when the petitions were filed, and have only been recently sold in the United States by LG. Finally, LG maintains that the rationale behind the petitioner's request to exclude smaller top-load washers (i.e., because they were not sold in the United States and the petitioner did not have an interest in seeking AD and CVD relief for them) is analogous to the rationale behind LG's scope exclusion request with respect to larger-width washers.

The petitioner opposes LG's request that larger-width washers be excluded from the scope of the investigations. Citing Ad Hoc Shrimp Trade Action Comm. v. United States, 637 F. Supp. 2d 1166, 1174 (CIT 2009), the petitioner maintains that the Department should give deference to the scope of the petition and the petitioner when analyzing scope modification requests. In light of the fact that excluding larger-width washers would be contrary to scope of the petitions and the petitioner's expressed intent in including them within the scope, the petitioner contends that the Department should deny LG's scope modification request.[21] The petitioner maintains that it is not required to produce every individual product within the scope, and notes that the Department has repeatedly rejected claims to modify the scope of a petition based on the fact that the product has not been produced in the United States.[22] Moreover, the petitioner argues that LG failed to support its assertion that larger-width washers represent a different class of product from the other products covered in the scope, particularly in regards to the Department's Diversified Products analysis.[23] The petitioner also argues that any attempt to demonstrate that larger-width washers constitute a different class or kind of products would be unsuccessful because they fall squarely

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[19] See Aluminum Extrusions From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 18524, 18532 (April 4, 2011).

[20] See Petitions for the Imposition of Antidumping and Countervailing Duties: Large Residential Washers from the Republic of Korea and Mexico, dated December 30, 2011.

[21] See Notice of Final Determination of Sales at Less Than Fair Value: Outboard Engines From Japan, 70 FR 326 (January 4, 2005), and accompanying Issues and Decision Memorandum at Comment 2.

[22] See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances in Part: Prestressed Concrete Steel Wire Strand From Mexico, 68 FR 42378, 42379 (July 17, 2003) (Prestressed Concrete Steel Wire Strand from Mexico).

[23] See 19 CFR 351.225(k)(2). See also Diversified Products Corporation. v. United States, 572 F. Supp. 883, 887 (CIT 1983) (Diversified Products).

within, and compete directly with, the class of products included in the scope of the petitions. Furthermore, the petitioner argues that LG's assertion that larger-width washers were not produced in the United States is inaccurate given that the petitioner offered a larger-width washer with a rated capacity of 5.30 cubic feet for sale to an OEM customer.

The Department's Position:

We disagree with LG, and for the reasons explained below, have not excluded larger-width washers from the scope of the investigations in the final determinations.

As stated above in Comment 1, the Department's practice is to provide ample deference to the petitioner with respect to the definition of the product for which it seeks relief under the AD and CVD laws. Absent an "overarching reason to modify" the scope in the petition, the Department accepts the scope as proposed.[24] Although the Department has the authority to define the scope of an investigation, that authority cannot be used to deprive the petitioner of relief with respect to products the petitioner clearly and explicitly intended to be included in the investigation, unless the resulting order would be otherwise unadministrable. Therefore, without the petitioner's consent, the Department has rarely used its authority to narrow the scope of an investigation.[25]

In this case, the plain language of the scope explicitly states that "large residential washers" denotes all automatic clothes washing machines, regardless of the orientation of the rotational axis, with a cabinet width (measured from its widest point) of at least 24.5 inches (62.23 cm) and ***no more than 32.0 inches*** (81.28 cm) (emphasis added). Given the clarity of this language, and the absence of any overarching reasons to modify it, we find no reason to amend the scope language by excluding larger-width washers (i.e., washers with widths of 29 inches or greater) which are clearly included in the scope. Moreover, the statute does not require the petitioner to produce every type of product covered by the scope of the investigation.[26] Thus, while a petitioner is

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[24] See Aluminum Extrusions From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 76 FR 18521 (April 4, 2011), and accompanying Issues and Decision Memorandum at Comment 1; Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 51788, 51789 (September, 5 2008); Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation, 66 FR 49347 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 12; and Mitsubishi Heavy Industries, Ltd. v. U.S., 986 F. Supp. 1428 (CIT 1997).

[25] Prestressed Concrete Steel Wire Strand from Mexico, 68 FR at 42379 (July 17, 2003), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Mexico, 68 FR 68350 (December 8, 2003).

[26] Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 69 FR 19400, 19402 (April 13, 2004), unchanged in Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 53677 (September 2, 2004), and accompanying Issues and Decision Memorandum at Comment 5; Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan:, 65 FR 42985 (July 12, 2000), and accompanying Issues and Decision Memorandum at Comment 1; and Prestressed Concrete Steel Wire Strand from Mexico at 42379.

required to produce the domestic like product, it need not produce every permutation or model of the domestic like product. Furthermore, the petitioner has expressed its intent to continue to seek AD and CVD relief on larger-width washers. Accordingly, based on our analysis of the descriptions of the merchandise in the petitions, we find no reason to exclude larger-width washers from the scope of the investigations.

Comment 3: Targeted Dumping

Prior to the Preliminary Determination, the petitioner alleged that targeted dumping existed with respect to Samsung and LG, and asserted that the Department should apply the average-to-transaction method in calculating the weighted-average dumping margins for these respondents pursuant to section 777A(d)(1)(B) of the Act. In each of these allegations, the petitioner asserted that there is a pattern of U.S. sales prices for comparable merchandise that differ significantly among purchasers, regions, and time periods. We conducted a targeted dumping analysis based on time periods, purchasers, and regions for both Samsung and LG using the methodology we adopted in Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (UAE Nails I), and Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) (PRC Nails) (collectively Nails).[27] Our methodology is discussed in more detail in the Preliminary Determination, 77 FR at 46394-95, and the Department's memoranda entitled "Preliminary Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc. (collectively, "LG");" and "Preliminary Determination Margin Calculation for Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively, "Samsung")," dated concurrently with the Preliminary Determination.

With respect to U.S. sales by LG and Samsung, for certain time periods, purchasers, and regions, we found that there was a pattern of export prices or constructed export prices that differ significantly and that these differences could not be taken into account using the average-to-average method. Accordingly, we used the average-to-transaction method to calculate the weighted-average dumping margin for Samsung and LG in the Preliminary Determination.

Both LG and Samsung objected to the application of the Department's targeted dumping analysis (i.e., the Nails test) and the bases of the petitioner's targeted dumping allegations in the

[27] See also Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011) (Wood Flooring), and accompanying Issues and Decision Memorandum at Comment 4; Certain Steel Nails From the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 17029 (March 23, 2012) (UAE Nails II), and accompanying Issues and Decision Memorandum at Comments 1 through 5; Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea, 77 FR 17413 (March 26, 2012) (Refrigerators), and accompanying Issues and Decision Memorandum at Comment 1; and Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Mexico, 77 FR 17422 (March 26, 2012) (Refrigerators from Mexico), and accompanying Issues and Decision Memorandum at Comment 1.

Preliminary Determination. The petitioner defended its allegations and the Department's application of the Nails test. Their respective arguments are outlined below.

a) The Targeted Dumping Analysis Applied in the Investigation

LG and Samsung object to the use of weighted-average net prices in conducting the targeted dumping analysis. The respondents contend that by compressing transaction-specific sales prices into weighted-average sales prices, the Department ignores actual market prices in applying the standard-deviation test and calculates an artificially low single standard deviation threshold.

According to the respondents, the first step of the Department's targeted dumping analysis involves replacing transaction-specific sales prices with calculated weighted-average sales prices, which may or may not correspond to each respondent's actual transaction prices. The respondents contend that, under this methodology, the Department assumes that all transactions take place at a "constructed," weighted-average sales price. As a result, the respondents argue that the Department's standard-deviation test is distortive, finding targeting where the respondents claim it does not exist, and vice-versa. In particular, LG and Samsung cite the application of the standard deviation measurement, which is calculated based on the weighted-average sales prices rather than the transaction-specific sales prices, and, therefore, they claim, is understated when compared to an "actual" standard deviation derived from the respondents' transaction-specific sales prices. In their respective case briefs, both LG and Samsung provide hypothetical examples to illustrate their points, as well as examples drawn from their reported data. They claim that, as a result of the reliance on weighted-average sales prices and the calculation of the standard deviation based upon those prices, the Department's methodology erroneously overstates the quantity of sales that pass the standard-deviation test (i.e., 33 percent or more of the allegedly targeted group's sales of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted-average price to all sales during the POI, targeted and non-targeted).

The respondents note that one basis for the alleged overstatement of the quantity passing the standard-deviation test is that the transaction-specific sales prices are replaced by the weighted-average sales prices. As a result, if the weighted-average sales price for a given product (as defined by the Department's physical characteristics and identified by control number, or "CONNUM") is below the one standard deviation threshold, then all of the sales of that CONNUM are deemed to have "passed" the standard-deviation test, regardless of the transaction-specific sales prices. Moreover, the respondents argue that, while the Department supposedly conducts the standard-deviation test based on one standard deviation, the examples in their briefs show that, due to the reliance on weighted-average sales prices rather than transaction-specific sales prices, in effect the test is based on one-half of a standard deviation. According to LG and Samsung, the Department's incorrectly calculated standard deviation will overstate the volume of transactions deemed to fall below the one standard deviation threshold, with the magnitude of the overstatement depending on the precise distribution of the transaction-specific sales prices.

In addition, Samsung argues that the Department's one-standard-deviation threshold is unreasonable and biased, and nowhere does the Department identify the statistical theory underlying its analysis, notwithstanding the fact that there are numerous statistical tests that can be performed to identify outliers. Samsung cites Chauvenet's Method, Peirce's Algorithm, and Grubb's Method, which it claims all imply that a price is an outlier if the difference between the transaction sales price and the overall average sales price is sufficiently "large." Samsung maintains that there is no support to find that one standard deviation is the correct number of standard deviations to use to detect outliers. According to Samsung, this is yet another reason why the Department's standard-deviation test is unsupported by substantial evidence.

LG and Samsung also challenge the application of the gap test, which is used to detect whether the weighted-average sales price to the allegedly targeted group is significantly distant from the next greater weighted-average sales price to a non-targeted group. They contend that the gap test ignores both market prices and market price distributions. According to the respondents, the flaw in the methodology is the gap test's focus only on the weighted-average sales prices to non-targeted groups that are greater than the allegedly targeted group's weighted-average sales price when applying the gap test. As a result, they continue, the weighted-average sales prices paid by the non-targeted groups are excluded from the analysis if they are lower than the allegedly targeted group's weighted-average sales price. Thus, the respondents assert, the Department automatically disregards the prices of sales to all such lower-priced non-targeted groups, which, they contend, might exonerate the alleged targeting. The respondents take issue with the reliance on weighted-average sales prices rather than transaction-specific sales prices, which, they contend, provide no information about the distribution of prices paid by the group that is used in the test, thereby making it impossible to determine if the distribution of prices paid by the allegedly targeted group is substantially lower than the distribution of prices paid by non-targeted groups. Both respondents provide examples of hypothetical situations, as well as examples from their reported data, in their respective case briefs to support their contentions regarding the application of the gap test.

The petitioner notes that the Nails test has been used in numerous previous proceedings, including Refrigerators, and has been upheld by the CIT in Mid Continent Nail v United States, 712 F. Supp. 2d 1370 (CIT 2010) (Mid Continent Nail). The petitioner notes that the respondents do not argue that the petitioner's allegations did not pass the Nails test. With respect to the use of weighted-average sales prices rather than the transaction-specific sales prices, the petitioner asserts that reliance on weighted-average sales prices is reasonable under the statute, and that the Department has addressed this argument in previous proceedings, such as Coated Paper[28] and Wood Flooring. The petitioner states that weighted-average sales prices are a composite of individual, transaction-specific sales prices, and the Department routinely relies on averages to discern patterns and make comparisons. Moreover, the petitioner points out that the statutory discussion of targeted dumping in Section 777A(a) of the Act is under the heading of "Sampling and Averaging: Determination of Weighted Average Dumping Margin and Countervailable Subsidy Rate." Accordingly, the petitioner concludes that the use of weighted-average sales prices to determine whether a pattern exists for the purpose of the targeted dumping analysis is both reasonable and statutorily consistent. Furthermore, the petitioner argues that any such

[28] Certain Coated Paper Suitable for High Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Antidumping Duty Determination, 75 FR 59217 (September 27, 2010) (Coated Paper), and accompanying Issues and Decision Memorandum at Comment 3.

change to the Nails test would require fundamental changes to the Department's analysis.

The petitioner also defends the Department's use of the one standard deviation threshold as applied in the Nails test. In particular, the petitioner explains that applying a different measurement for the standard deviation, i.e., using the transaction-specific sales prices rather than the weighted-average sales prices, may widen the standard deviation through particularly high-priced sales, which may be the specific sales that contribute to the masking of dumping that the statute seeks to address. On the other hand, the petitioner continues, comparisons based on the standard deviation of the differences between the weighted-average sales prices appropriately addresses whether or not there is a pattern of significant price differences as mandated by the statute.

With respect to the respondents' challenge to the gap test and its exclusion of measuring the price differences to certain lower-priced sales, the petitioner responds that the argument misconstrues the purpose of the gap test. According to the petitioner, the fact that there is a pattern of lower prices to an entity is already established by the standard-deviation test before the analysis turns to the gap test.

b) Basis for the Targeted Dumping Allegations and the Application of the Targeted Dumping Analysis

LG contends that the Department's targeted dumping analysis is flawed because of its fundamental assumption that significant variations in prices in the U.S. market must be attributable to predatory pricing practices on the part of a respondent. However, LG counters that many factors influence pricing decisions and can drive price fluctuations, as identified below. Thus, LG contends that the Department cannot assume that because price variations exist, targeted dumping exists. Rather, LG notes that the SAA[29] provides "that in determining whether a pattern of significant price difference exists, {the Department} will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."[30]

LG contends that key factors specific to the washing machine industry impact the prices offered by all market participants (domestic and foreign). These factors include:

- Strong seasonal pricing patterns: LG cites its U.S. market experience demonstrating that there is an increasing reliance on specific, periodic incentive programs, the most important of which is associated with "Black Friday" and the year-end holidays, but that other major seasonal purchasing periods include Memorial Day weekend and Independence Day. LG asserts that the ITC recognized the existence of a seasonal pricing pattern in its preliminary investigation, observing that "LRW discounting is concentrated during annual promotional events coinciding with holidays, including Columbus Day, Independence Day, Earth Day,

[29] Uruguay Round Agreements Act (URAA), H. Doc. 316, Vol. 1, 103d. Cong. (1994) (SAA).

[30] Id. at 843.

and especially Black Friday, which is the day after Thanksgiving."[31] Nevertheless, LG asserts that the Department refuses to adjust its targeted dumping analysis for any promotional period, including Black Friday - a day on which they contend that lower prices are observed in nearly every consumer product category in every region of the United States. Samsung joins with LG in stressing the impact of Black Friday in the industry.

- Time pattern of new model introduction: According to LG, the Department's methodology ignores the timing of the introduction of new models. LG cites the statement in its August 13, 2012, submission by its Washing Machine Product Manager, who explains that washing machine manufacturers typically introduce major new models from April to June and September to October. LG states that, under the normal model pricing cycle, gross prices are typically at their highest point at the time of new model introduction, and rebate and other incentive programs are at their lowest. After initial product introduction, LG continues, a specific model generally is sold at higher gross prices, with rebates and other incentive programs used to boost sales volume. Thereafter, according to LG, net price trends for the model exhibit a fairly steady decline, interrupted by temporary drops below the general trend line for specific promotional events. Toward the end of its life cycle, LG concludes, the model is sold at lower gross prices, with more significant price declines and rebate programs. However, LG contends that the Department's targeted dumping analysis ignores this pricing life cycle, and, instead, contrary to LG's representation of the U.S. market, the methodology assumes that the pricing for each product should remain relatively constant throughout any given time period.
- Differences in quantities sold for different models: According to LG, washing machines are highly-differentiated consumer products, with many different models offered at any given period of time. LG provided an analysis in its case brief to demonstrate that different models sold during the POI were sold in many different quantities, ranging from dozens to tens of thousands. LG notes that Section 773(a)(6)(C)(i) of the Act recognizes that prices can vary with quantities, but the Department's targeted dumping analysis does not. Rather, LG contends, the methodology assumes that all models within a CONNUM are sold in relatively the same quantities and thus should be priced at relatively the same levels, and that all customers buy relatively the same models within a given CONNUM. LG argues that this assumption has no basis in the reality of the U.S. washing machine market, and the Department inappropriately fails to account for these quantity differences in its targeted dumping analysis.
- Differences in sales volume by customer: LG states that it sells in different sales volumes to different customers. In turn, LG states that the Department's targeted dumping analysis fails to account for differences in the volumes purchased by different customers, which leads to findings of targeting where pricing simply is responding to normal market factors.

The respondents acknowledge that, in responding to previous challenges to its targeted dumping analysis, the Department has, in cases such as Coated Paper and Wood Flooring, asserted that its methodological choices are within its discretion under the AD statute. However, LG contends that the Department abuses its discretion when its methodology makes it impossible to discern

[31] ITC Investigation Nos. 701-TA-488 and 731-TA-1199-1200 (Publication No. 4306), at page 22.

anything meaningful about a respondent's pattern of pricing in the U.S. market, and may effectively mask the pricing trends that the AD statute requires the Department to identify. LG asserts that the Department should revise its targeted dumping analysis to reflect price volatility in the U.S. washers market. LG argues that this could be accomplished by increasing the number of standard deviations in the standard-deviation test from one to two, or by applying a de minimis threshold under which targeting must be found in excess of a certain percentage of the U. S. sales database.

Samsung asserts that the statutory provision that grants authority for investigating whether targeting has occurred does not define the geographic regions, purchasers, or time periods that the Department should investigate, and the SAA requires that the Department's analysis be case-specific. According to Samsung, the definition of a region is purely results-oriented and arbitrary, and was developed by the petitioner solely to find targeting by using whatever "region" definition satisfied the Department's standard-deviation and gap tests. Samsung argues that the period must bear a relationship to the pricing practices of the specific respondent being investigated. Therefore, Samsung asserts that there is no basis to conclude that Samsung maintains an identical pricing, discount, or rebate strategy for the nine states that supposedly comprise the Northeast region, the subject of the petitioner's region-based targeted dumping allegation against Samsung.

Similarly, Samsung argues that there is no factual or legal basis upon which always to elect to use a monthly analysis versus a weekly analysis, or any other limited time-period analysis. According to Samsung, the respondent and industry practices govern the selection of the appropriate time periods to analyze. Samsung claims that the petitioner has an obligation to explain, and the Department has an obligation to consider, why it is appropriate to apply the standard-deviation and price gap tests to the particular time period or periods that the petitioner chooses. Samsung complains that the Department's approach gives no recognition to the manner in which Samsung and other members of the washing machine industry, including the petitioner, establish the invoice prices to their customers and then sometimes grant post-sale rebates and discounts to those customers. Samsung states that it does not establish the invoice price to its retailers on a calendar-month basis, and, therefore, it is irrational to use a calendar month as the time period to analyze whether targeting has occurred.

Samsung also contends that a finding that it engaged in targeting based on sales to three of its smaller customers would be unreasonable and is not supported by substantial evidence on the record. Samsung claims that the three alleged targeted customers accounted for a small percentage of its total sales volume, and that for several of the CONNUMs, at least one non-targeted customer paid a lower price than any of the targeted customers. This result, according to Samsung, is completely inconsistent with the theory of significant price differences among customers that lead to the masking of dumping because if masking is occurring, then the non-targeted customers should be paying higher prices, rather than lower prices.

Finally, Samsung argues that the inability of the Department to provide respondents with the means to comply with U.S. AD laws and price fairly to avoid a dumping finding is a prime reason why these tests are unlawful. Samsung claims that a respondent has no ability to understand how it should set its prices to avoid a targeting finding unless it charges the exact same price to every customer on every day of the year in every region in the country. Samsung maintains that this is an impossible task for a producer that sells a highly-differentiated product, such as large residential washers, to a diverse customer base in different locations, and that makes sales often driven by promotions that vary in length of time and amount.

The petitioner responds to LG's arguments that the Nails test ignores such things as seasonal trends and promotional pricing by acknowledging that promotional pricing is common in the industry, but that its existence does not provide a license for respondents to mask dumping. In response to Samsung's contention that the petitioner wrongly focused its targeted dumping allegations on specified regions, time periods based on months, or only some smaller customers, the petitioner asserts that its targeted dumping allegations fit squarely within the statutory categories of purchaser, region and time period, and are thus fully appropriate for consideration and analysis by the Department.

With respect to LG's arguments that there may be differences in the product mix in a CONNUM or in the timing of the introduction or sale of certain products in a CONNUM, the petitioner contends that those arguments relate to the reliance on CONNUMs, rather than the measurement of targeted dumping. The petitioner continues that the Department must construct a workable methodology to fairly conduct its targeted dumping analysis, and the use of CONNUMs allows for the practical application of the statute with respect to product comparisons in the same manner as the use of weighted-average sales prices does for price comparisons.

The Department's Position:

Based on the updated U.S. sales data and calculation revisions discussed elsewhere in this Decision Memorandum, we have continued to find that pursuant to section 777A(d)(1)(B) of the Act, the use of an average-to-transaction method is warranted in calculating the weighted-average dumping margins for both LG and Samsung. Consistent with our practice and the statute, we have found that a pattern of EPs (or CEPs) for comparable merchandise that differ significantly among purchasers, regions, or time periods does exist for each respondent, and that the average-to-average method is not able to account for the observed price differences for both respondents.

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" 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 such a comparison.

Section 777A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to EP or CEP and places certain restrictions on the Department's selection of a comparison method in AD investigations. The statute and regulations provide for three comparison methods by which normal value may be compared with export price or constructed export price: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other. 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 for which the EPs or CEPs have been averaged together (i.e., for an averaging group).

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 ratio. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

Section 777A(d)(1) of the Act establishes that, in an AD investigation, the normal comparison method will be either the average-to-average method or the transaction-to-transaction method. Section 777A(d)(1)(B) of the Act sets forth the exception when the Department may apply the average-to-transaction method:

> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the NVs to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if
>
> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

In order to determine whether a pattern exists in this case, the Department relied on its targeted dumping analysis based on the Nails test, as it did in the Preliminary Determination. The Nails test has been applied and updated in numerous cases since UAE Nails I and PRC Nails. See, e.g., Wood Flooring and Refrigerators. Moreover, the CIT has upheld our use of the Nails test, finding it reasonable and consistent with the statute and regulations. See Mid Continent Nail.

In the first stage of the test, the "standard-deviation test," we determined the volume of the allegedly targeted group's sales of subject merchandise that are at prices more than one standard deviation below the weighted-average price of all sales during the POI, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (i.e., by CONNUM) using the POI-wide weighted-average sales prices for the allegedly targeted groups and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of a respondent's sales of subject merchandise for the allegedly targeted group, then we did not conduct the second stage of the Nails test. If that volume exceeded 33 percent of the total volume of a respondent's sales of subject merchandise for the allegedly targeted group, on the other hand, then we proceeded to the second stage of the Nails test.

In the second stage, we examined all sales of identical merchandise (i.e., by CONNUM) sold to the allegedly targeted group which passed the standard-deviaton test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales to the allegedly targeted group and the next higher weighted-average price of sales for a non-targeted group exceeds the average price gap (weighted by sales volume) between the non-targeted groups.[32] We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted sales were not included in the non-targeted group; the allegedly targeted group's weighted-average sales price was compared only to the weighted-average sales prices to the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then we determined that targeting occurred.

If we determined that a sufficient volume of U.S. sales were found to have passed the Nails test, then the Department considered whether the average-to-average method could take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using the average-to-transaction method. Where there was a meaningful difference between the results of the average-to-average method and the average-to-transaction method, the average-to-average method would not be able to take into account such price differences, and the average-to-transaction method would be used to calculate the weighted-average margin of dumping for the respondent in question. Where there was not a meaningful difference in the results, the average-to-average method would be able to take into account such price differences, and the average-to-average method would be used to calculate the weighted-average dumping margin for the respondent in question.

In this investigation, we find for both LG and Samsung, based on the petitioner's targeted dumping allegations, that a pattern of EPs or CEPs for comparable merchandise that differs significantly among purchasers, regions or time periods exists. Further, our analysis shows that the average-to-average method does not take into account such price differences because there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method for both respondents. We therefore have applied the average-to-transaction method for LG and Samsung in this final determination.

The respondents' principal methodological objection relates to the use of weighted-average sales prices in conducting the Nails test. However, this issue has been addressed in previous proceedings. See Coated Paper at Comment 3, Wood Flooring at Comment 4, and UAE Nails II at Comment 2. As we explained in those proceedings, in exercising our discretion, we interpret

[32] The next higher price is the weighted-average sales price to the non-targeted group that is above the weighted-average sales price to the allegedly targeted group. For example, if the weighted-average sales price to the allegedly targeted group is $7.95 and the weighted-average sales prices to the non-targeted groups are $8.30, $8.25, and $7.50, we would calculate the gap as the difference between $7.95 and $8.25 because $8.25 is the next higher weighted-average sales price to a non-targeted group above $7.95 (i.e., the weighted-average sales price to the allegedly targeted group).

"export prices" (as well as "constructed export prices") in section 777A(d)(1)(B)(i) of the Act to mean a weighted average of the individual sales prices. In the context of testing to see whether purchasers, time periods, or regions have been targeted, the relevant price variance, in the Department's view, is the variance in price across purchasers, time periods, and regions, not across transactions. For this reason, the Department approaches the problem by analyzing the variance of the weighted-average sales prices paid by each group.

The respondents assert that the Department's use of weighted-average sales prices is unreasonable because the use of these weighted averages produces distorted results. To illustrate their points, LG and Samsung include a number of hypothetical examples in their respective case briefs, as well as examples drawn from their respective U.S. sales data. However, these examples fail because they are premised on an incorrect reading of the statute.

The focus of the statute is not, as the respondents' hypothetical examples suggest, on the variation of transaction-specific sales prices per se, or even on a difference between individual transactions to a particular group. Rather, the statute is explicitly concerned with export prices that "differ significantly *among* purchasers, regions, or periods of time." See section 777A(d)(1)(B)(i) of the Act (emphasis added). As we noted in Coated Paper, "{i}n the context of testing to see whether customers have been targeted, the relevant price variance . . . is the variance in prices across *customers*, not *transactions*" (emphasis added). Using weighted averages allows the Department to disregard meaningless variations and focus instead on uncovering a pattern of prices *among* groups, as required under section 777A(d)(1)(B)(i) of the Act.

Moreover, averaging is a well-recognized tool in Department's dumping analyses. Section 777A(d)(1)(A) of the Act expressly provides for the use of *both* average-to-average comparisons and transaction-to-transaction comparisons in investigations without favoring one method over the other as more accurate. In the absence of such guidance, the Department has discretion to select a reasonable methodology and discretion to change it, providing a reasoned explanation for the change. See Huvis Corp. v. United States, 570 F.3d 1347, 1354–55 (Fed. Cir. 2009) (holding that the Department may change its past practice when there are good reasons for the new policy). Given that the statute focuses on variation *among* purchasers, *among* regions, and *among* time periods, rather than variations between individual transactions, the respondents have not demonstrated that weight-averaging individual sales prices for each group is unreasonable.

Because we analyze price variances based on weighted-average sales prices, we have found that it is appropriate and consistent to perform the gap test on the same basis. See, e.g., Wood Flooring. We do not agree with the respondent's argument that our gap test is flawed because it does not consider the weighted-average sales prices of non-targeted groups that are below the weighted-average sales price of the allegedly targeted group. In addition, the respondents do not demonstrate why the significant-difference requirement can only be met by the use of gaps that both "look up" and "look down." See UAE Nails II.

With respect to the respondent's arguments concerning the application of the one-standard-deviation threshold, we note that the Department has consistently held the one-standard-deviation threshold to be a distinct and reasonable "bright line" to measure quantitatively significant price differences. See, e.g., Refrigerators. As the Department first explained in PRC Nails at Comment 3, and UAE Nails I at Comment 5:

> We consider the price threshold of one standard deviation below the average market price as a reasonable indicator of a price difference that may be based on targeted dumping because (1) it is a measure of "low" relative to the spread or dispersion of prices in the market in question, and (2) it strikes a balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others …, and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others….

The CIT also affirmed the use of the one-standard-deviation threshold. See Mid Continent Nail at 1370, and 1377-78.

With respect to Samsung's contention that other statistical tests should be applied to identify outliers, the Department has previously rejected other statistical tests as an alternative to the standard-deviation measurements. See, e.g., PRC Nails at Comment 3, and UAE Nails I at Comment 5, as cited above. The Department has noted that the only substantive difference between the approaches is the threshold for identifying a pattern, which tends to be more conservative in the respondents' proposals. See Coated Paper at Comment 3. Moreover, the application of the standard-deviation test has been accepted by the CIT.

LG and Samsung suggest that the Department should increase the standard-deviation test's threshold to two standard deviations. However, the Department has rejected past proposals (see, e.g., Refrigerators) to raise the standard-deviation threshold because to do so would only identify extreme outliers and likely mask all but the most obvious examples of targeting, thus thwarting the purpose of identifying whether a pattern of significant price differences exists. In Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 20335 (April 19, 2010) and accompanying Issues and Decision Memorandum at Comment 2, we stated:

> … the number of sales with prices that are two standard deviations below the average market prices is too restrictive a standard because it would likely only identify outliers in the observed price data and not identify a pattern of targeted prices within the observed price data. Therefore, the Department believes that one standard deviation, rather than two standard deviations, is a better measurement to distinguish potentially targeted prices using this test.

With respect to the respondents' contention that the Department should apply a de minimis threshold before invoking the average-to-transaction method, we note that the Department has also addressed this argument in previous cases As we discussed above, we considered the volume of U.S. sales that passed the Nails test. See, e.g., UAE Nails II. However, the Department does not employ a de minimis threshold but rather makes its determination on a case-by-case basis. As we stated in UAE Nails II, the statutory language of section 777A(d)(1)(B)(i) of the Act

> does not establish how a pattern of prices should be measured in terms of the prevalence of underlying sales in relation to all sales. Instead, the statute states that there must be a variance in export prices among purchasers, regions, or periods of time, and that the variance must exhibit a pattern.

With respect to LG's arguments concerning the elements in the washing machine industry that may impact pricing, and Samsung's arguments regarding the time periods and regions in the petitioner's allegations, we note that Congress explained in the SAA that section 777A(d)(1)(B) of the Act is meant to address "situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, i.e., where targeted dumping may be occurring."[33] Congress explained that "before relying on this methodology, however," after finding a pattern among the purchasers, regions, or time periods, the Department is first required to "establish and provide an explanation why it cannot account for such differences through the use of an average-to-average or transaction-to-transaction comparison."[34]

Congress did not speak to the "intent" or motivation of the producers or exporters, as the price discriminators, in setting prices that are significantly different between the periods of time, purchasers or geographic regions being examined, nor did it provide that the Department is prohibited from conducting an analysis under this provision if, for example, certain products might be seasonal in nature. The statute and the regulations provide considerable guidance on comparing U.S. prices to NV in its dumping analysis, but they provide no similar guidance in comparing U.S. prices for the purpose of determining the existence of a dumping pattern of significant price differences. Instead, Congress stated that "the Administration intends that in determining whether a pattern of significant prices differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."[35] Thus, while the Department may consider other factors in conducting a targeted dumping analysis, the statute does not require the Department to consider why such differences exist.

The only obligations imposed on the Department in its analysis appear in section 777A(d)(1)(B) of the Act. Section 777A(d)(1)(B) of the Act requires the Department (1) to examine whether there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods and, if such a pattern exists, (2) to explain why such differences cannot be taken into account using the average-to-average or transaction-to-transaction comparison methods. The Act does not require the Department to discern why such patterns arise. As stated in UAE Nails II, at Comment 1, the Department is not required to determine

> "why" an exporter's pricing behavior may differ significantly as between different customers, regions or time periods. Indeed, inserting this kind of standard into a targeted dumping analysis is nowhere found in the Act and it would likely create an unmanageable standard for the Department.

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[33] See SAA at 843.

[34] Id.

[35] Id.

> Instead, the Act requires the Department to determine whether a pattern of export price differences exists without regard to "why." When such a pattern exists, the Act indicates that export prices may not be appropriate for application of the A-A comparison methodology.

The Act describes a difference among "purchasers, regions, or periods of time," and does not limit the Department's analysis as to the nature of the purchaser, the definition of a region, or the length of time which the agency must consider. If the Department were restricted in its analysis, for example, to analyzing only "seasons" with respect to price patterns that differ among periods of time, then one would anticipate that Congress would have placed such a restriction in the text of the Act. Instead, the Act requires simply that the Department review U.S. prices on the basis of "periods of time," and determine on the basis of that analysis if there is a pattern of prices for comparable merchandise that differs significantly "among" those periods. It is therefore sufficient for purposes of the requirements of Section 777A(d)(1)(B) of the Act that a petitioner make an allegation under this provision unique to a designated period of time within which the Department can analyze prices on the basis of the alleged periods of time, as the petitioner has done in this investigation. Similarly, it is sufficient for the purposes of this statutory provision that a petitioner make an allegation unique to designated purchasers or regions within which the Department can analyze prices on those bases.

Consistent with the text of Section 777A(d)(1)(B) of the Act and the language of the SAA, the Department has analyzed whether a pattern existed among the designated purchasers, regions, and time periods for each respondent, and whether the differences in prices were significant. The Act and legislative history do not require that the Department conduct an additional analysis, as argued by the respondents, and determine the reasons that significant differences in prices exist. Accordingly, because no such analysis is mandated by the Act, where the Department has determined that there was a pattern of EPs (or CEPs) for comparable merchandise that differs significantly among purchasers, regions, and periods of time in this investigation, the Department has not opined on the reasons for such price differences. Instead, the Department simply has determined whether a pattern of significant price differences exists, as directed by the Act.

Finally, with respect to Samsung's argument that the Department should provide guidance on how respondents may avoid a finding of targeted dumping, we note that the Department's analysis and dumping calculations are intended to measure accurately the actual results of a respondent's pricing behavior, rather than provide the expected results. Our dumping analysis depends on a number of factors beyond the analysis of price patterns in the U.S. market. Further, the courts have repeatedly held that, given the retrospective nature of U.S. AD laws, foreign exporters are not entitled to expect that the Department's practice will remain fixed in time, and that "the absence of certainty regarding the dumping margins … is a characteristic of the retrospective system of administrative reviews designed by Congress." <u>See</u> <u>Abitibi Consol. Inc. v. United States</u>, 437 F. Supp. 2d 1352, 1361–62 (CIT 2006); <u>Bethlehem Steel Corp. v. United States</u>, 27 F. Supp. 2d 201, 207 (CIT 1998); <u>D&L Supply Co. v. United States</u>, 841 F. Supp. 1312, 1315 (CIT 1993).

<u>Comment 4</u>: <u>Zeroing in the Average-to-Transaction Method</u>

LG and Samsung contend that when the Department applied the average-to-transaction method in the Preliminary Determination, it improperly "zeroed" non-dumped comparisons in its calculation of the weighted-average dumping margin. Citing Dongbu Steel v. United States, 635 F. 3d 1363, 1372 (Fed. Cir. 2011) (Dongbu Steel) and JTEKT Corp. v. United States, 642 F.3d 1378, 1383-85 (Fed. Cir. 2011) (JTEKT), LG argues that the Court of Appeals for the Federal Circuit (CAFC) has held that it is unreasonable for the Department to interpret the AD statute to permit zeroing in certain situations but not in others, without adequate explanation. Although these CAFC decisions involve administrative reviews rather than investigations, LG maintains that the principle with respect to the use of zeroing in the average-to-transaction method is the same, and thus the Department has been effectively barred by the CAFC from using zeroing in the average-to-transaction method. According to LG, the application of zeroing in this investigation due to a finding of targeted dumping would create the same inconsistent statutory interpretation at issue in Dongbu and JTEKT, given that the Department already has discontinued the use of zeroing in investigations that do not involve targeted dumping, as well as in administrative reviews. As a result, LG contends that the Department would be unable to provide an adequate justification for this inconsistent statutory interpretation in the instant investigation, particularly as LG claims that the CAFC has considered and rejected all of the justifications proffered by the Department in Dongbu, JTEKT, and Corus Staal BV v.United States, 395 F.3d 1343, 1346-47 (Fed. Cir. 2005) (Corus Staal).

LG also contends that zeroing used in conjunction with the average-to-transaction method is inconsistent with the World Trade Organization (WTO) AD Agreement (WTO AD Agreement). LG points to the WTO Appellate Body decisions regarding the use of zeroing in administrative reviews[36] in support of its argument that zeroing would also not be permitted under a targeted dumping analysis. While LG acknowledges that these WTO decisions were rendered in the context of administrative reviews, LG contends that the CAFC decision in Dongbu holds that "there is no statutory basis for interpreting {section 771(35) of the Act} differently in investigations than in administrative reviews." See Dongbu at 635 F.3d at 1371.

In addition, Samsung argues that it is inconsistent with Article 2.4.2 of the WTO AD Agreement for the Department to have used zeroing in computing weighted-average dumping margins in this investigation because the Appellate Body has ruled that it is impermissible to use zeroing in the average-to-transaction method, just as in the average-to-average and transaction-to-transaction methods.

LG and Samsung object to the Department's practice, as articulated in Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value, 75 FR 14659 (March 26, 2010) (Bags from Taiwan), and accompanying Issues and Decision Memorandum at Comment 1, to apply the average-to-transaction method to all U.S. sales, not just to those sales where targeted dumping is found to have occurred.

[36] LG cites to United States - Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R at 190(c) (January. 9, 2007); and United States - Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R at 395(d) (February 4, 2009).

LG states that, in accordance with section 777A(d)(1) of the Act, the Department may only apply the average-to-transaction method in investigations when the targeted dumping criteria are met and thus, in turn, the targeted dumping criteria can only be met with respect to the target. Citing section 777A(d)(1)(B)(ii) of the Act, LG states that the Department may only apply the average-to-transaction method when the Department explains why differences in a pattern of prices cannot be taken into account by the average-to-average method. Thus, LG continues, even if the Department could explain why differences in the pricing of targeted transactions could not be taken into account, as there is no pattern of price differences for the non-targeted sales, there is no basis to resort to the average-to-transaction method for those sales. Therefore, LG concludes, if the Department were to apply the average-to-transaction method for any of LG's allegedly targeted sales, it should do so only for those targeted sales and not for LG's non-targeted sales.

Samsung stresses that the application of the average-to-transaction method to the non-targeted sales is inconsistent with the WTO AD Agreement. Samsung cites the language in Article 2.4.2 of the Agreement[37] as limiting the use of the average-to-transaction method to only those comparisons involving targeted export sales. Samsung further states that its interpretation is supported by the WTO Appellate Body finding in United States - Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R, adopted on January 23, 2007, which concluded that "{i}n order to unmask targeted dumping, an investigating authority may limit the application of the {average-to-transaction} comparison methodology to the prices of export transactions falling within the relevant pattern."

The petitioner argues that the CAFC opinions cited by LG do not support LG's argument concerning the use of zeroing in the average-to-transaction method because those decisions concerned the use of zeroing in administrative reviews, not investigations involving targeted dumping allegations. With respect to the argument that zeroing is inconsistent with U.S. obligations under the WTO AD Agreement, the petitioner states that this argument is one that that has been made repeatedly and rejected in previous proceedings, and the Department should reject it again in this investigation. The petitioner dismisses the respondents' objections to the Department's use of zeroing in conjunction with its targeted dumping analysis as allegedly inconsistent with the WTO AD Agreement, stating that there is no reason to alter this methodology conducted under applicable U.S. law based on speculation about future WTO opinions.

The Department's Position:

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that providing offsets 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 investigation.

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[37] "A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchases, regions, or time periods…"

The issue of "zeroing" versus "offsetting" involves how certain results of comparisons are treated in the aggregation of the numerator for the weighted-average dumping margin and relates back to a statutory 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 numerator for the weighted-average dumping margin. Application of "offsetting" treats such negative comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative comparison amount may be included in the aggregation of the numerator of the weighted average dumping margin to the extent that positive comparisons amounts are included in the same numerator.

The Department interprets the application of the average-to-average method to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas the application of the average-to-transaction method 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 method allows for an overall examination of pricing behavior on average. The Department's interpretation of section 771(35) of the Act to permit zeroing when aggregating average-to-transaction comparisons, as in this investigation, and to provide offsets when aggregating average-to-average comparisons, reasonably accounts for differences inherent in these distinct comparison methods.

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 POI; 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 CAFC has found in the word "exceeds" as used in section 771(35)(A) of the Act. See Timken Co. v. United States, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (Timken). The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.[38] For decades, the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the CAFC and other courts squarely addressed the reasonableness of the Department's zeroing methodology and unequivocally held that the Department reasonably

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[38] 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."); and 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.").

interpreted the relevant statutory provision as permitting zeroing.[39] 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 AD 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."[40] The CAFC explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." See Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department.

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 WTO AD Agreement when it employed the zeroing methodology when aggregating average-to-average comparisons in certain challenged AD investigations. See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (October 31, 2005) (EC-Zeroing Panel). The initial WTO Dispute Settlement Body Panel Report was limited to the Department's use of zeroing in average-to-average comparisons in AD investigations. See EC-Zeroing Panel, WT/DS294/R. The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the URAA (19 USC § 3533(f), (g)) (Section 123). See AD Proceedings: Calculation of the Weighted-Average Dumping Margin During an AD Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006); and AD Proceedings: Calculation of the Weighted – Average Dumping Margin During an AD Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (June 26, 2007) (together, Final Modification for Investigations). 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 AD investigations. The Panel did not find fault with the use of zeroing by the United States in any other context.

Without an affirmative inconsistency finding by the WTO Panel, the Department did not propose to alter its zeroing practice in other contexts, such as in investigations using average-to-transaction comparisons. As the CAFC recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance. See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F. 3d 928, 934 (Fed. Cir. 2010). The Department began to provide offsets in the limited context of average-to-average

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[39] 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."); and Bowe Passat, 926 F. Supp. at 1149-50; and Serampore, 675 F. Supp. at 1360-61.

[40] See 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 (Mar. 17, 1986)); see also Timken, 354 F.3d at 1343; PAM, 265 F. Supp. 2d at 1371.

comparisons in AD investigations. See Final Modification for Investigations, 71 FR at 77722. With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of AD investigations using average-to-average comparisons. The Department did not change its practice of zeroing when using other types of comparisons, including average-to-transaction comparisons in investigations. See 71 FR at 77724.

The CAFC subsequently upheld the Department's decision to cease zeroing when aggregating average-to-average comparisons in AD investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when aggregating average-to-transaction comparisons in certain investigations and administrative reviews. See U.S. Steel v. United States, 621 F.3d 1351 (Fed. Cir. 2010) (U.S. Steel) at 1355 n.2, 1362-63. In upholding the Department's decision to cease zeroing when aggregating average-to-average comparisons in AD investigations, the CAFC accepted that the Department likely would have different zeroing practices when aggregating average-to-average and other types of comparisons in AD investigations. See, id., at 1363 (stating that the Department indicated an intention to use zeroing when using average-to-transaction comparisons in investigations to address concerns about masked dumping). The CAFC's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in AD investigations and the Department's limited decision to cease zeroing only with respect to one comparison type. See, id., at 1361-63.

The CAFC acknowledged that section 777A(d) of the Act permits different types of comparisons in AD investigations, allowing the Department to make average-to-transaction comparisons where a pattern of significant price differences exist. 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. The CAFC 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. See U.S. Steel, 621 F. 3d at 1363. In summing up its understanding of the relationship between zeroing and the various comparison methods that the Department may use in AD investigations, the CAFC 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." See id. (emphasis added). Furthermore, we note that where average-to-transaction comparisons are used in situations of targeted dumping, the results of not applying zeroing methodology when aggregating those comparison results as well as when aggregating average-to-average comparison results would be the same. Therefore, the provision for different comparison methods under section 777A(d) of the Act would be meaningless. This outcome could not have been intended by Congress in providing for different comparison methods under section 777A(d) of the Act.

We disagree with LG that the CAFC decisions in Dongbu Steel and JTEKT require the Department to change its methodology in this investigation with respect to application of the average-to-transaction method. These holdings were limited to finding that the Department had not adequately explained different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews. The CAFC did not address the use of zeroing in the context of a "targeted dumping" analysis in a less-than-fair value investigation. Unlike the determinations examined in Dongbu Steel and JTEKT, this is an original investigation using a "targeted dumping" analysis – the very circumstance the CAFC contemplated in U.S. Steel as a situation where the zeroing methodology would continue to be applicable. We also disagree that the CAFC's decision in Dongbu Steel indicates that the CAFC would not support zeroing in the context of targeted dumping analysis in an investigation, because that issue was not before the Court.

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, 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 export price. 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 aggregated, weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons 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 URAA 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.

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.[41] 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 average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither section 123 of the URAA nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of

[41] 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 AD duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

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 situation – i.e., to abandon the use of zeroing only with respect to average-to-average comparisons in AD investigations – 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 in average-to-average comparisons relative to all other contexts.

Moreover, the Department's interpretation reasonably accounts for inherent differences between the results of distinct comparison methods. The Department interprets section 771(35) of the Act depending upon the type of comparison method 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 comparisons to permit negative comparison results to offset or reduce the sum of the positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using the average-to-average method, 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 merchandise of the foreign like product. In calculating the average EP or CEP, the Department averages all U.S. prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable merchandise. 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 method, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis "on average" for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging group comparisons to determine the aggregate 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 method, which permits EPs and CEPs above NV to offset EPs and CEPs 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 ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction method under 777A(d)(1)(B) of the Act, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction method, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison method yields results specific to each individual export transaction. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – i.e., the amount of dumping found for each individual U.S. sale – to calculate the weighted-average dumping margin. 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 comparison results.[42] Thus, when the Department focuses on transaction-specific comparison results, the Department reasonably interprets the word "exceeds" in section 771(35)(A) of the Act as including only positive comparison results in the aggregate dumping margin. Consequently, when using the average-to-transaction method, the Department reasonably does not permit negative comparison results to offset or reduce the sum of the positive comparison results when determining the aggregate dumping margin within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of the average-to-average method to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas the average-to-transaction method 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 method allows for a reasonable examination of pricing behavior, on average. The average-to-average method inherently 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 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 average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction method.

The Department has provided to the courts in several cases its further explanation for its different interpretation of section 771(35) of the Act – i.e, for zeroing when using the average-to-transaction method and for providing offsets when using the average-to-average method. To date, the CIT has affirmed the Department's explanation. See Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States, Slip Op. 12-137 (Ct. Int'l Trade Nov. 15, 2012); Far Eastern New Century Corp. v. United States, 2012 WL 3715105 (CIT Aug. 29, 2012); Grobest & I-Mei Indus. (Vietnam) Co. v. United States, 853 F. Supp. 2d 1352 (CIT 2012); Union Steel v. United States, 823 F. Supp. 2d 1346 (CIT 2012). Because the Department's explanation relies, in part, on the inherent differences between average-to-transaction comparisons and average-to-average comparisons, the explanation is also relevant to the context of investigations using average-to-transaction comparisons pursuant to section 777A(d)(1)(B) of the Act.

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[42] 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.

With respect to other WTO reports finding the denial of offsets by the United States to be inconsistent with its obligations under the WTO AD Agreement, the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. See Corus Staal, 395 F.3d at 1347-49; accord Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007); and NSK , 510 F.3d at 1375. 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 U.S. statute. See 19 U.S.C §3538(b)(4) (implementation of WTO reports is discretionary). 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. See 19 U.S.C. §3533(g).

Accordingly, and consistent with the Department's interpretation of the Act described above, the Department employed the average-to-transaction method for LG and Samsung, and where any of the U.S. sales transactions examined in this investigation are found to exceed NV, the amount by which the EP or CEP exceeds NV will not offset the amount of dumping found with respect to transactions where NV exceeds the EP or CEP.

With respect to the application of the average-to-transaction method to the non-targeted sales, the Department has previously determined that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a uniform application of average-to-transaction comparisons for all transactions when satisfaction of the statutory criteria suggests that application of the average-to-transaction method is appropriate. See, e.g., Bags from Taiwan at Comment 1. The only limitations the statute places on the application of the average-to-transaction method are the satisfaction of the two criteria set forth in the statute. When the criteria for application of the average-to-transaction method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the average-to-transaction method to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average NVs to the EPs (or CEPs) of individual transactions. While the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the average-to-transaction method to all sales, it does find that this interpretation is a reasonable one and is more consistent with the Department's approach to the selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally.

The respondents' argument that the average-to-transaction method should only be applied to the U.S. sales which are found to be targeted would undermine the determination that a pattern of significant price differences exists under section 777A(d)(1)(B)(i) of the Act. This pattern is initially identified by the petitioner in its targeted dumping allegation when it identifies purchasers, regions or time periods which may be the basis of such a pattern. The Department then employs the Nails test to confirm whether the alleged purchasers, regions or time periods have been targeted based on the weighted-average sales prices to purchasers, regions, or time periods, allegedly targeted or not. Then, under section 777A(d)(1)(B)(ii) of the Act, the Department must explain whether the significant price differences can be taken into account by the average-to-average or transaction-to-transaction methods, and if not, then the Department may apply the average-to-transaction method. If the Department were to apply the average-to-transaction method only to those U.S. sales which pass the Nails test, as argued by the respondents, then this approach would include only part of the U.S. sales which constitute the identified pattern. In other words, the U.S. sales which pass the Nails test represent only part of the pricing behavior of the respondent, which, in and of themselves, do not constitute the identified pattern which is based on significant price differences between all groups, whether allegedly targeted or not. The identified pattern is defined by all of the respondent's U.S. sales. To consider whether the average-to-average or transaction-to-transaction method can account for only part of the identified significant price differences, and if so, then to apply the average-to-transaction method to only part of the identified significant price differences, would be an incomplete application of the statute.

If Congress had intended for the Department to apply the average-to-transaction method only to a subset of transactions and use a different comparison method for the remaining sales of the same respondent, Congress could have explicitly said so, but it did not. Instead, Congress expressed its intent with the language of section 777A(d)(1)(B), which imposes a general preclusion from using average-to-transaction comparisons and withdraws that preclusion entirely if the two criteria are satisfied. In the absence of a preclusion, the Department is free to apply the average-to-transaction method to all transactions. The Department may choose any method that is appropriate. In this case, the Department determined that the two criteria are satisfied. The statute does not preclude the Department's decision to apply the average-to-transaction method to all of the respondents' transactions, and the Department has explained its reasons for doing so.

Contrary to LG's contentions, the statute does not require the Department to determine whether such differences can be taken into account by a combination of average-to-transaction and average-to-average methods. The Department has established criteria for determining whether the average-to-average or transaction-to-transaction method is the more appropriate methodology; the Department generally uses the average-to-average method, except under circumstances that make the use of the average-to-transaction method more appropriate. See, e.g., Refrigerators at Comment 2. However, the Department does not use a hybrid methodology of making average-to-transaction comparisons for certain transactions and average-to-average comparisons for other transactions in calculating the weighted-average dumping margin. Rather, the Department determines the appropriate comparison method and applies it uniformly to all comparisons of NV and EP or CEP.

Moreover, LG's proposal of applying the average-to-transaction method to some of its sales, but not the others, is based on a flawed assumption that profitable sales are not involved in masked dumping. The CAFC has explained that "masked" dumping occurs, when "profitable sales serve to 'mask' sales at less than fair value." See U.S. Steel, 621 F.3d at 1361. A Korean exporter, who competes with U.S. producers, could gain U.S. customers either by dumping to all customers at once or by dumping to a specific customer (or customers). In the latter scenario, the Korean exporter uses its "profitable" (i.e., non-dumped) sales to mask its dumped sales to a particular customer by compensating for its dumped sales to one customer with its profitable sales to other customers. In other words, the masked or targeted dumping involves both profitable and dumped sales. The Department reasonably addresses such masked dumping by applying the average-to-transaction method to all sales involved in masked dumping, i.e., both the masked sales and the sales that are used for masking. When the Department applies the average-to-transaction method to all of the exporter's sales (including the profitable sales that the exporter used to mask its dumping), it eliminates the masked dumping by exposing (1) any implicit masking within the weighted-average U.S. sales price by basing the comparison on the transaction-specific U.S. sales price, and (2) any explicit masking between averaging groups by not providing offsets for negative comparison results. Accordingly, the Department's current methodology of employing the average-to-transaction method for all transactions reasonably addresses the problem of masked dumping. And when the conditions set forth in section 777A(d)(1)(B) are satisfied, the Department will use the average-to-transaction method. The CIT and the CAFC repeatedly have recognized that the average-to-transaction method, and in particular the denial of offsets for non-dumping transactions, combats masked dumping, which section 777A(d)(1)(B) addresses. See, e.g., Timken, 354 F.3d at 1343; see also Serampore, 675 F.Supp. 1354, 1360-1361; see also Bowe Passat.

LG

Comment 5: Rebates

Citing the Department's determination in Refrigerators to apply AFA to LG's reporting of rebates, the petitioner claims that LG again failed to allocate accurately the rebates granted on home market and U.S. sales. According to the petitioner, LG's methodology in this investigation failed to capture all rebates, did not tie rebates accurately to specific sales, or otherwise departed from its own books and records. The petitioner identifies three sets of reported rebates which, according to verification findings, demonstrate LG's failure to report rebates properly; the arguments concerning these rebates are outlined below. Therefore, the petitioner contends that, consistent with Refrigerators, the Department should apply AFA to LG's reported rebate amounts, as outlined below, in order to ensure that LG's rebate allocations more accurately reflect LG's actual commercial experience and to encourage LG's future compliance.

LG defends its rebate reporting in this investigation, citing the extraordinary effort it made to identify, assign and allocate rebates accurately, which it detailed in its questionnaire responses, and which the Department verified in detail. LG acknowledges its deficiencies in reporting rebates in Refrigerators, but asserts that the petitioner misunderstands LG's rebate programs, its internal rebate documentation, and the assignment and allocation methodologies applied in this investigation. As discussed below, LG responds to each of the petitioner's arguments regarding allegedly distortive examples of LG's rebate reporting. LG asserts that the petitioner's complaints are baseless and that LG's comprehensive and conservative rebate reporting methodology in this investigation should be accepted in full.

a) Reporting of U.S. Sell-in Rebates Under the REBATE1U Variable

As discussed in LG's questionnaire responses and the LG U.S. Sales Verification Report,[43] LG

[43] See Memorandum entitled "Verification of the CEP Sales Responses of LG Electronics, Inc. and LG Electronics USA Inc.," dated October 15, 2012 (LG U.S. Sales Verification Report).

reported "sell-in" rebates to U.S. customers under the REBATE1U variable. Under sell-in rebate programs, the customer is eligible for a fixed-percentage or fixed-amount rebate at the time of sale. LG posts the rebate amount as an accrual in its accounting system. For reporting the REBATE1U amounts on an actual, rather than accrual, basis in this investigation, and to ensure that rebates attributable to POI sales but paid outside the POI are included, LG reconciled its accrual amounts to the actual paid amounts over a two-year period including the POI, i.e. from January 1, 2010, through December 31, 2011.

The petitioner contends that LG did not report the amounts under the REBATE1U field accurately based on the Department's findings at verification. Specifically, the petitioner cites two findings with regard to REBATE1U:

1) As stated in the verification report, the Department found that "LG accrued the full amount on washing machine sales for one sell-in rebate program under the REBATE1U field, but calculated the payment rate based on all sales in the DFT accounting unit, even though the rebate program did not apply to all sales of products within that unit."[44] As a result, the petitioner states that LG understated the amount of this rebate by improperly increasing the denominator over which the amount of the rebate program was divided.

2) After the Department "questioned LG whether its two-year payment rate calculation window was sufficient to capture all rebates applicable to POI sales, especially with respect to rebates based on 2011 sales volume," LG provided additional data by extending the window for determining payment rates by an additional six months, showing that the total amount of rebates paid for REBATE1U increased by a significant amount.

The petitioner claims that these discrepancies demonstrate that LG failed the regulatory burden under 19 CFR 351.401(g)(2) to report allocated expenses and price adjustments "on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions." According to the petitioner, LG did not disclose to the Department until the verification that its methodology was inaccurate and yielded distortive results. Therefore, the petitioner asserts that LG's distortive results significantly impeded the Department's verification within the meaning of section 776(a) of the Act, resulting in the necessary information not being available on this record. Further, the petitioner claims that the Department should determine that LG did not act to the best of its ability to provide information within the meaning of Section 776(b) of the Act and should apply an adverse inference in selecting the facts otherwise available to adjust REBATE1U for the final determination margin calculation. As adverse facts available, the petitioner asserts that the Department should apply the highest rebate percentage for any U.S. customer which had a positive value under REBATE1U to all sales to all customers that received a REBATE1U rebate.

LG defends its rebate reporting methodology in general, and in reporting REBATE1U in particular. With respect to the petitioner's two specific objections, LG explains that the first

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[44] See Id. at page 17. The DFT accounting unit is the accounting unit where LG's washer sales are posted.

program, an allowance for minor damage to major appliances,[45] was accrued over all products in the business unit, although it was paid out based only on sales of major appliances. As a result, LG continues, it adjusted the over-accrual rate by the actual payment rate, consistent with its rebate accounting system and its normal course of business. LG contends that it would be absurd and disproportionate to accept the petitioner's call for the application of AFA for all reported REBATE1U on the basis of a perceived misallocation of this single, isolated rebate program. While LG stands by its allocation methodology, nevertheless, it states that if the Department disagrees with its allocation methodology for this program, the Department collected the information at verification to reallocate the amounts.[46]

With respect to the petitioner's second objection regarding the two-year payment rate calculation window, LG submits that its methodology was reasonable. Citing its questionnaire response submissions and the LG U.S. Sales Verification Report, LG explains that its use of a two-year window to reconcile the rebate accruals allocated to POI sales with the actual rebate amounts credited to those sales was accurate and reasonable, particularly in light of the enormous number of rebate programs involved and the LG's limited administrative resources available to compile and report the information within the Department's deadlines. Nevertheless, LG states that, if the Department determines that the two-year payment rate window is insufficient for reconciling REBATE1U accruals to REBATE1U actual payments, the Department obtained at verification information based on a two-and-a-half year payment rate window that would enable it to adjust LG's reporting. According to LG, that methodology would be based on verified information and more reasonable than the AFA approach advocated by the petitioner.

b) Assignment of Rebates under REBATE5H and REBATE4U Variables

For those "sell-out" and lump sum programs in both markets for which LG determined it was unable to allocate on a transaction- or model-specific basis, LG reported the amounts based on a POI customer-specific ratio. In the home market, these rebates were reported under the REBATE5H variable. In the U.S. market, these rebates were reported under the REBATE4U variable.

The petitioner contends that the Department found at verification that LG did not report REBATE5H and REBATE4U as specifically as possible based on LG's records. According to the Department's findings in its verification reports, the petitioner asserts that the Department tested examples of programs reported under these variables and found that LG's records, including "hard copies" of rebate program descriptions, permitted allocation of rebate programs on a more specific, time-period- and/or model-specific basis. Because LG failed to adequately use its electronic and hard-copy records to allocate these rebate amounts on a more specific basis, the petitioner claims that facts available under section 776(a) of the Act is warranted for adjusting

[45] LG requested proprietary treatment for the purpose of this rebate in its rebuttal brief, but disclosed the rebate purpose in public versions of its questionnaire responses and during the public session of the hearing (see, e.g., Public Session Hearing transcript at page 100). The purpose of this rebate was also discussed in the public version of the LG U.S. Sales Verification Report at pages 19 – 20.

[46] See LG U.S. Sales Verification Report at Exhibit 78.

LG's reporting of REBATE5H and REBATE4U. Further, the petitioner claims that the Department should determine that LG failed to cooperate by not acting to the best of its ability to provide information within the meaning of section 776(b) of the Act and should apply an adverse inference in selecting the facts otherwise available to adjust these rebate amounts. As adverse facts available, the petitioner asserts that, for REBATE5H, the Department should use the minimum rebate percentage for any home market customer and apply it across all home market customers. For REBATE4U, the petitioner advocates that the Department should calculate a weighted-average REBATE4U rebate rate across U.S. customers and apply that rate if the reported REBATE4U rebate percentage in LG's U.S. sales database was lower.

LG explains that it reported all rebate amounts on the most specific basis possible, and that the vast majority of its rebate reporting was on a transaction- or model-specific basis. To determine the basis for its rebate reporting, LG asserts that it took extraordinary steps to determine the most specific basis for allocating rebates. Contrary to the petitioner's assertion, LG states that it also examined non-electronic records as part of its process. However, LG states that it found inconsistencies or conflicts in its records which would affect the accuracy of its reporting. Accordingly, LG followed its rebate allocation methodology and defaulted to the highest level of specificity allowed by the consistent information in its records. LG asserts that, not only was this approach reasonable, it was the only approach that took into consideration in a thoughtful and conservative manner all of the rebate information available to LG. Moreover, LG contends that the Department's verification demonstrated the reasonableness and conservativeness of LG's methodology. Therefore, LG concludes, there is no basis to reject LG's reporting of these rebates and to apply AFA.

c) Reporting of REBATE6_1U and REBATE6_4U

LG reported two sets of rebate programs that applied to its customers who were members of a buying group during the POI. The rebates to those customers that could be allocated on a transaction-specific basis were reported under the REBATE6_1U variable. Those rebates that could not be allocated more specifically were allocated to all of the qualifying customers using the same rebate ratio and reported under the REBATE6_4U variable.

The petitioner contends that LG failed to report rebates reported under the REBATE6_1U and REBATE6_4U accurately because, according to the petitioner's analysis, the amounts LG reported for the qualifying customers were inconsistent with LG's description of the rebate programs. For example, the petitioner asserts that LG did not report REBATE6_1U amounts for certain sales to buying group members which, according to the rebate descriptions, should have received the same rebate percentage as reported for similar sales to the same buying group customers. Similarly, the petitioner contends that LG did not a report an amount for REBATE6_4U for certain members of the buying group for which REBATE6_4U applied, according to LG's description of the rebate program. Therefore, the petitioner asserts that, as facts available, the Department should calculate rebates for the relevant sales to customers for which LG failed to report a value for REBATE6 _1U or REBATE6_4U.

LG responds that its reporting of these rebates is correct and the petitioner has misinterpreted LG explanations of the rebate programs. With respect to REBATE6_1U, LG explains that it reported this rebate on a transaction-specific basis and, therefore, it is appropriate that some sales of the same model to the same customer would include this rebate, and others would not. With respect to REBATE6_4U, LG contends that the petitioner relied on an incorrect list of buying group members in making its argument. LG explains that it allocated this rebate to those customers who were members of the buying group as of the last month of the POI and are listed in the LG U.S. Sales Verification Report at Exhibit 80. Accordingly, LG has reported both sets of rebates accurately and there is no basis to substitute a facts available amount for either variable.

<u>The Department's Position</u>:

We disagree with the petitioner. As an initial matter, we recognize that LG has put forth substantial effort and resources to address the rebate reporting deficiencies identified in <u>Refrigerators</u> in order to provide a more accurate methodology for reporting rebates in this investigation. As LG outlines in its case brief, LG has provided substantial information for the record to describe and document its rebate reporting methodology. Among other things, LG solicited a meeting with Department officials on this topic early in the investigation to seek guidance as to how it should reports its rebates.[47] LG submitted extensive questionnaire and supplemental questionnaire responses addressing rebate reporting, and engaged in a thorough examination of rebate reporting during the two sales verifications. Although the petitioner contends that LG's overall methodology is flawed, it only provided three sets of rebate examples where it identifies specific issues with LG's rebate reporting. As discussed further below, only with respect to one of these sets of rebates do we find cause to adjust LG's reporting. Otherwise, we accept LG's rebate reporting as reasonable and non-distortive.

a) REBATE1U

As the petitioner states, during the CEP sales verification, we identified two issues concerning the reporting of LG's sell-in rebates. We disagree with the petitioner that these issues demonstrate the overall inaccuracy and distortiveness of LG's rebate reporting. Rather, they represent the only significant issues which arose from a thorough examination of LG's methodology. LG fully disclosed its methodology in reporting these rebates in its questionnaire responses, and we obtained the necessary information at verification to revise the reported amounts in a manner we believe is more representative of these rebates. Consequently, we find no basis to conclude that LG's REBATE1U reporting is distortive, nor that LG did not act to the best of its ability in reporting REBATE1U. Thus, there is no basis to apply AFA in adjusting REBATE1U.

With respect to the damage allowance program, we observed at verification that:

> {a}ccording to the terms of the program, LG credited the customer $[I.II] per unit sold, but that amount was applicable only to major appliances and excluded items such as pedestals and water filters. <u>See</u> page U-16 of LG U.S. Sales Verification Report at Exhibit 80. Given the terms of the rebate program and its application on a transaction-specific basis, we questioned why the payment

[47] <u>See</u> Memorandum to the File entitled "Meeting with LGE Counsels on Reporting of Sell-Out Rebates" dated April 17, 2012.

> rate was less than 100 percent.
>
> LG explained that, in the trade management system, it accrues the per-unit amount on all sales within the DFT accounting unit, although it pays claims under the rebate program only on major appliance sales. That is, even though LG would not grant compensation under the damage allowance program toward the sale of a washing machine or dryer pedestal, in its accounting system it still accrues the rebate amount for such sale.

See the LG U.S. Sales Verification Report at page 19.

Although LG records an accrual for this program for all sales within the business unit, the terms of the rebate agreement with the customer clearly state that the rebate applies only to major appliances. Therefore, it is appropriate to allocate the rebate amounts only to the products specified in the agreement. Accordingly, we have revised the REBATE1U amount for the applicable sales by applying the full value of the rebate, based on information obtained at verification. See the LG U.S. Sales Verification Report at page 20 and Exhibit 78, and the LG Sales Calculation Memo.

With respect to the two-year window LG used to reconcile accrual amounts with actual rebate payments, we observed at verification that this methodology may not fully account for volume-based rebates because the window ended at December 31, 2011, and rebate claims for the year 2011 may have continued through 2012. See the LG U.S. Sales Verification Report at pages 22 and 24. At our request, LG performed an additional analysis at verification and showed that expanding the window for an additional six months captured additional rebate amounts. See id at 24. This revision of LG's methodology, we believe, provides a reasonable means of matching rebates paid after the POI with the sales made during the POI. Accordingly, we have adjusted the reported REBATE1U amounts using the information derived from the additional six-month period, as provided at verification. Because LG granted a high proportion of volume-based rebates to one U.S. customer relative to its other customers, we increased the reported REBATE1U amount for sales to that customer by a certain percentage, and for sales to all other customers by a different percentage, as verified. See the LG U.S. Sales Verification Report at page 24 and Exhibit 87, and the LG Sales Calculation Memo.

b) REBATE5H and REBATE4U

We agree with LG that its methodology for assigning rebate amounts under these variables was reasonable, and we have accepted LG's reporting for the final determination. As LG noted in its rebuttal brief, LG was able to allocate the vast majority of the rebates paid to home market and U.S. customers on a transaction- or model-specific basis. Thus, only a relatively small proportion of the rebates were assigned to these variables, where the rebate amount was allocated on a customer-specific basis for the POI.

The petitioner points to results derived from a detailed examination of specific sales selected at verification, where the Department obtained information that indicated it may have been possible to allocate certain rebates reported in these categories on a more specific basis. As we noted in our verification reports, LG was able to obtain additional detailed rebate information beyond its electronic records for the relatively small number of sales examined at verification, however, "it did not perform this manual exercise for the thousands of rebate programs applicable to the sales of hundreds of thousands of washing machine units during the POI." See the LG Home Market Sales Verification Report at page 24;[48] see also LG U.S. Sales Verification Report at page 20. Moreover, our examination of other rebate programs reported under these variables supported LG's explanation that a more specific allocation was not possible. See, e.g., LG U.S. Sales Verification Report at page 21. Given the extremely large number of sales and rebate programs involved in this investigation, and the time and resource restraints LG faced in meeting the questionnaire response deadlines, along with the fact that LG reported most rebates on a more specific basis, we find LG's REBATE5H and REBATE4U reporting methodology reasonable and, thus, we do not agree with the petitioner that we should find that LG failed to cooperate by not acting to the best of its ability and to apply AFA for these rebates.

c) REBATE6_1U and REBATE6_4U

We agree with LG that it reported the rebate amounts under these variables properly. LG reported, and the Department verified, that REBATE6_1U was reported on a transaction-specific basis. See, e.g., LG U.S. Sales Verification Report at page 16 and Exhibits 83 and 84. Therefore, the petitioner's observation that REBATE6_1U was not reported for each sale made to the buying group member is irrelevant because not all of the sales made to the buying group were eligible for the rebates reported under this variable.

REBATE6_4U represents lump-sum rebates paid directly to the buying group, rather than LG's customers. LG allocated the amount paid to the buying group to the buying group's members for purposes of the questionnaire responses. See LG July 23, 2012, supplemental questionnaire response at 3. At the CEP sales verification, we obtained two lists of buying group members: one list included as LG U.S. Sales Verification Report at Exhibit 77, and a second list included in the rebate reconciliation documents contained in LG U.S. Sales Verification Report at Exhibit 80. The petitioner's argument is based on the Exhibit 77 list of buying group members. However, it is the Exhibit 80 list upon which LG relied to allocate the lump-sum rebate amounts paid to the buying group. As LG clarified in its rebuttal brief, as membership in a buying group may vary over the course of time, it relied on the membership as of the last month of the POI for allocating these rebates. We find this methodology to be reasonable and have accepted it for the final determination in this investigation.

Comment 6: Conducting the Sales-Below-Cost-Test Based on Level of Trade

The Department's methodology executes the sales-below-cost test by first comparing each individual home market sales transaction to the corresponding weighted-average model-specific cost. The program then computes, on a model-specific basis, the percentage by quantity of sales that failed the cost test to determine whether below-cost sales were made in substantial quantities. If the volume of sales that failed the cost test represents 20 percent or more of the volume of sales of a given model, then only those individual sales passing the sales-below-cost test are retained for

[48] See Memorandum entitled "Verification of the Home Market and Export Price Sales Responses of LG Electronics, Inc.," dated October 11, 2012 (LG Home Market Sales Verification Report).

purposes of calculating NV. However, if the percentage of sales failing the cost test is less than 20 percent, no sales of that particular model are disregarded. This programming step does not distinguish among levels of trade (LOTs). That is, all sales of a given model, regardless of LOT, are aggregated for purposes of determining the percentage that were below cost.

The petitioner argues that the Department should revise its standard methodology to account for different LOTs when performing the substantial quantities test, because the programming language currently in use understates LG's dumping margin. The petitioner asserts that because LOT 2 sales in the home market (LG's sales to retailers) and LOT 3 sales (downstream sales by an affiliate) are aggregated for the substantial quantities test, the pool of sales used for computing NV includes certain LOT 2 sales to retailers that would have been properly disregarded were it not for the aggregation of the two LOTs. The results of the cost test, the petitioner asserts, impact price-to-price comparisons. In the preliminary margin program, the petitioner notes, LG's U.S. CEP sales (i.e., "LOT 1") were matched to home market sales made at the next closest LOT as the U.S. sale. According to the petitioner, because there were LOT 2 sales for every model where LOT 3 sales also occurred, LOT 3 sales were never used for matching purposes. Thus, the petitioner believes the program as it currently operates creates distortion in the margin calculation and masks dumping, due to the inclusion of those LOT 2 sales that should have been disregarded, but instead are used to calculate a NV for comparison to U.S. sales.

The petitioner asserts that the Department has recognized that specificity is important in conducting the cost test, and that it has therefore developed a practice to perform the test on as specific a basis as possible. For example, the petitioner notes that the Department generally declines to compare prime and non-prime merchandise for the sales-below-cost test. As support for these assertions, the petitioner cites the SAA at 832, which provides that "the cost test will generally be performed on no wider than a model-specific basis." The petitioner also cites Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (April 2, 2002) (Lumber from Canada), in which the Department declined to conduct the sales-below-cost test by comparing the total weighted-average prices across products to the total weighted-average costs across products. In that case, the petitioner claims, the Department recognized that were it to conduct the cost test in this manner, there would be "substantial risk of masking potential dumping margins through averaging" and that the Department would "lose any type of specificity in {its} comparisons."

LG counters that the statute does not authorize the Department to disaggregate LOTs when conducting the sales-below-cost test. LG notes that, in calculating the net price for use in the cost test, the Department eliminates from the comparison the specific selling, movement, and packing expenses that vary due to LOT and that define the differences in home market LOTs. LG asserts that, in so doing, the Department has already taken into account any differences in price between different LOTs.

LG asserts that the petitioner's comparison between its proposed approach and our practice of distinguishing prime and non-prime merchandise is misplaced. LG maintains that the Department distinguishes between prime and non-prime merchandise in the cost test because there are fundamental differences in the physical characteristics of the merchandise. Moreover, LG argues, the petitioner has not identified any instance in which the Department has disaggregated LOTs in performing the substantial quantities component of the cost test.

The Department's Position:

We disagree with the petitioner that we should deviate from our established practice to account for LOT when conducting the sales-below-cost test. Under section 773(b) of the Act, below-cost sales may be excluded only if they "have been made within an extended period of time in substantial quantities," and "were not at prices which permit recovery of all costs within a reasonable period of time . . . ." The statute is silent as to the precise conduct of the cost test. Further, there is nothing in the Department's regulations or the SAA prescribing a particular methodology for determining whether sales may be disregarded. The SAA provides only that "the cost test generally will be performed on no wider than a model-specific basis" (emphasis added). Where the statute is silent or ambiguous, the determination of a reasonable and appropriate method is left to the discretion of the Department. See, e.g., Chevron U.S.A Inc. v. Natural Resources Defense Council, 467 U.S. 837; 104 S. Ct. 2778 (1984). The Department has, over time, developed a consistent, predictable and reasonable practice in this regard to perform the sales-below-cost test and the "substantial quantities" test on a model-specific basis. See, e.g., Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 67 FR 55780 (August 30, 2002), and accompanying Issues and Decision Memorandum at Comment 37. The Courts have sanctioned this model-specific approach for conducting the cost test. For example, in Mitsubishi Heavy Industries, Ltd. v. United States, 22 CIT 541; 15 F. Supp. 2d 807 (CIT 1998), the CIT held that "the model-specific cost test represents a permissible application of the statute" and that "{u}se of the model-specific cost test is part of Commerce's usual practice." We also note that, in Lumber from Canada, cited by the petitioner, the Department explicitly acknowledged its practice with regard to the conduct of the cost test, stating that "{i}n past cases, {we} have routinely performed the cost test on a model-specific basis." See Lumber from Canada at Comment 5. Therefore, for this final determination, we have continued to follow our established practice of conducting the sales-below-cost test and substantial quantities test on a model-specific basis, without distinguishing between different LOTs.

Comment 7: General and Administrative Expenses

LG's reported overall G&A expense ratio includes separate calculations for R&D expenses and G&A expenses. After the Preliminary Determination, LG presented a revised approach for calculating both the R&D and G&A expenses that are included in its overall G&A expense ratio. See LG's August 13, 2012 Submission of Factual Information. With respect to the G&A expense calculation, LG analyzed the G&A expenses recorded on the company-wide audited financial statements and classified them as either "G&A" (i.e., headquarter-level G&A expenses LG maintains relate to the company as a whole) or as "additional factory overhead" (i.e., G&A expenses recorded by different divisions within the company which LG asserts are not general in nature). All expenses in the first category were included in the company's revised G&A ratio, while those classified as "additional factory overhead" by LG were included in the reported cost of manufacture if they were recorded by a division involved in the production of subject merchandise.

LG argues that its revised approach for calculating the G&A expense ratio that is included in the overall G&A expense ratio calculation is appropriate and should be adopted by the Department for the final determination. The respondent asserts that this methodology, because it includes only "headquarter-level" G&A expenses, conforms closely to the Department's definition of G&A expenses as general in nature and related to the company as a whole rather than to specific products or markets, and is consistent with the Department's standard approach for identifying G&A expenses. Moreover, LG argues, its proposed methodology achieves the Department's stated objective in Final Determination of Sales at Less Than Fair Value: Sweaters Wholly or in Chief Weight of Man-Made Fibers from Hong Kong, 55 FR 30733 (July 27, 1990) (Sweaters from Hong Kong), of "capturing expenses related to total corporate operations."

The petitioner responds that the Department properly calculated LG's G&A expense ratio in the Preliminary Determination by relying on LG's books and records as maintained in the normal course of business and that no recalculation is therefore necessary. Citing Certain Preserved Mushrooms from Indonesia: Final Results of Antidumping Duty Administrative Review, 66 FR 36754 (July 13, 2001), the petitioner contends that it is well-established that G&A expenses are those expenses which relate to the activities of the company as a whole rather than to production. The petitioner maintains that LG's proposed allocation departs from the manner in which these G&A expenses are recorded in its financial statements and re-categorizes certain expenses to achieve an artificially lower G&A ratio. LG's approach, the petitioner asserts, does not conform to the SAA, which states that expenses should be calculated in accordance with the books and records of the respondent, so long as those records are maintained in accordance with GAAP.

The Department's Position:

We disagree with LG and have continued to calculate G&A expenses on a company-wide basis. Section 773(b)(3)(B) of the Act provides that, for purposes of calculating cost of production (COP), the Department shall include "an amount for selling, general and administrative (SG&A) expenses based on actual data pertaining to the production and sales of the foreign like product by the exporter in question." The law does not prescribe a specific methodology for calculating the G&A expenses. Where the statue is silent or ambiguous on a specific issue, the determination of a reasonable and appropriate method is left to the discretion of the Department.

Because there is no bright-line definition in the Act of what constitutes G&A expenses or precisely how to calculate a G&A expense rate, the Department has developed a consistent and predictable approach to calculating and allocating G&A expenses. This methodology is to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales, and not on a consolidated, divisional, or product-specific basis. See, e.g., Refrigerators at Comment 35. See also Notice of Final Results of the Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta From Italy and Determination to Revoke in Part, 70 FR 71464 (November 29, 2005), and accompanying Issues and Decision Memorandum at Comment 5. In addition to being consistent and predictable, we believe this methodology is a reasonable application of the statute that discourages "results-oriented" approaches to calculating G&A expense. Our practice with respect to G&A expenses is reflected in the Department's standard cost questionnaire, which instructs that the G&A expense rate should be calculated as the ratio of total company-wide G&A expenses divided by total company-wide cost of goods sold.

As noted above, LG's proposed approach for calculating the G&A expense ratio excludes those expenses which it claims are not general for the entire company, but specific to a particular unit. LG reclassified the G&A expenses in question as "additional fixed overhead," and included in the reported product-specific cost of manufacturing those additional "overhead" items it maintains relate to the subject merchandise.

We have examined the division-specific income statements LG used as a basis for determining which G&A expenses from the company-wide financial statements it claims were general in nature and related to the company as a whole, and which expenses it maintains relate to a particular division or product. See LG Cost Verification Report at Exhibit 5, page 113,[49] and LG's October 11, 2012, submission at Exhibit 19. Based on our review, we find that the G&A expenses in question, which LG maintains are direct expenses incurred specifically at the divisional level and are not related to the general operations of the company as a whole, are actually allocated general costs. This finding is supported by specific evidence on the record. However, because much of the information is business proprietary in nature, we have addressed this issue in detail in the LG Cost Calculation Memo. We disagree that the expenses LG classifies as related to specific divisions or products are anything other than general in nature. As we have articulated in past cases, G&A expenses by their nature are indirect expenses that relate to the company as a whole, and are not directly related to a process or a product. See, e.g., Certain Lined Paper Products from India: Notice of Final Results of the First Antidumping Duty Administrative Review, 74 FR 17149 (April 14, 2009). This is consistent with Sweaters from Hong Kong, cited by LG, where the Department calculated G&A using all expenses related to general operations.

Moreover, the expenses at issue are all classified as G&A expenses in LG's audited company-wide financial statements. Therefore, for the final determination, we have not adopted LG's suggested approach for calculating the G&A portion of the overall G&A expense ratio. Consistent with our practice, we have continued to include the G&A expenses as recorded on the company-wide financial statements in the G&A expense ratio and to allocate them over the company-wide cost of sales.

Comment 8: Alleged Affiliation of LG and its Input Suppliers

The petitioner argues that LG is affiliated with four of its largest suppliers of inputs through a close supplier relationship in which LG has the potential to exercise direction or control, and that the

[49] See Memorandum entitled "Verification of the Cost Response of LG Electronics, Inc. in the Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea" (October 11, 2012) (LG Cost Verification Report) at page 25.

Department should put LG on notice that it must provide cost information for these suppliers in any future administrative review. The petitioner asserts that the Department erred in its Preliminary Determination by failing to analyze the close supplier affiliation criteria and instead based its decision that the relationship between LG and its input suppliers did not constitute a close supplier relationship solely upon the fact that LG did not purchase 100 percent of the output of each supplier.

The petitioner notes that section 771(33)(G) of the Act defines an affiliated party as "any person who controls any other person and such person," and states that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." Further, the petitioner notes, the SAA specifically enumerates close supplier relationships as those relationships where "the supplier or the buyer becomes reliant upon the other." See SAA at 838. Consistent with the standard articulated by the CIT that "{t}he determination of control…is thus not dependant on actually exercising control, but rather the capacity to exercise control," the petitioner asserts that no court has ever required that a respondent purchase 100 percent of the output of a supplier in order to support a close supplier determination. See Ferro Union v. United States, 44 F. Supp. 2d 1310, 1324 (CIT 1999) (Ferro Union). This criterion added by the Department, the petitioner contends, does not adequately take into account modern commercial relationships as directed by the SAA. The petitioner continues that the Department's regulations at 19 CFR 351.102(b)(3) state that affiliation is found if the relationship is such that it has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.

The petitioner argues that information on the record of this investigation supports a finding of affiliation by virtue of a close supplier relationship between LG and its top four input suppliers. For example, the petitioner maintains that LG provided technical assistance to increase the suppliers' productivity, transferred raw materials at less than market prices to the four suppliers, and provided no interest loans to the suppliers.

With respect to the loans and technical assistance LG provided to the suppliers, the petitioner asserts that the Department should include the value of these items in LG's manufacturing costs. The petitioner further asserts that the statute requires the Department to account for these costs, noting that section 773(f)(1)(A) of the Act provides that "cost shall….reasonably reflect the costs associated with the production and sale of the merchandise."

With respect to the supplier loans, the petitioner argues that, if the Department determines that there is no evidence that the loan was actually repaid, it should treat the loan as a grant and add the entire amount, plus interest, to LG's costs. However, the petitioner maintains that, at a minimum, the Department should estimate an amount for interest on these loans using a market interest rate and increase LG's reported cost of manufacturing by the resulting amount. As for technical assistance provided by LG, the petitioner further proposes that, although there is a gap on the record regarding the exact value of technical assistance, the Department can estimate this amount using information on the record.

The petitioner draws parallels between this case and Certain Welded Stainless Steel Pipe from

Taiwan; Final Results of Administrative Review, 62 FR 37543 (July 14, 1997) (Steel Pipe from Taiwan). In the latter case, the petitioner notes, the Department found that Ta Chen had a close supplier relationship because of access to computer systems, some sharing of employees, technical know-how, and loans. The petitioner submits that LG's relationship with its suppliers allows LG employees access to the suppliers' computer systems and production decisions. Similarly, the petitioner asserts, LG shares employees, provides technical know-how, and provides zero interest loans without requiring collateral. The petitioner also argues that there is no evidence on the record that LG's suppliers ever looked to, or could look to, any other buyer for the goods sold to LG.

The petitioner continues that the test for control is prospective in that the Department considers the potential to control another party. See Ferro Union. The petitioner asserts that LG plays an outsized role in the day-to-day operations of its top four input suppliers and that, in focusing on whether the suppliers sold exclusively to LG, the Department ignored other indicia of control in coming to the conclusion in the Preliminary Determination that there was no basis for finding affiliation.

LG responds that the Department correctly found that LG is not affiliated with its input suppliers. LG asserts that, as articulated in the Preliminary Determination, the Department thoroughly explored this issue and determined that there is no record evidence to support a conclusion that LG controls its input suppliers through a close supplier relationship. LG argues that the petitioner has not presented any additional evidence that would warrant a different conclusion. LG disagrees with the petitioner's assertion that the Department based its finding solely on the fact that LG did not purchase 100 percent of the output of each supplier, noting that both the Preliminary Determination and the preliminary cost calculation memorandum indicate that the terms and provisions of supply agreements, the terms of financing agreements, and the overall profitability of each of the suppliers were considered in the Department's analysis, in addition to the relative sales percentages. LG also takes issue with the petitioner's assertion that LG purchased raw materials and transferred them at less than market value to the four suppliers, arguing that the Department found, to the contrary, that the full cost of raw material inputs provided to the suppliers was included in the cost of the sub-assemblies incorporating those inputs which LG subsequently purchased from the suppliers.

LG argues that Steel Pipe from Taiwan provides no basis for a finding of affiliation in this case. In that case, LG notes, the Department found that the manufacturer was affiliated with a distributor because the distributor was established at the manufacturer's request, was staffed entirely by current or former employees of the manufacturer, and only distributed the manufacturer's products. LG further asserts that the distributor pledged its entire inventory and accounts receivable to the manufacturer's bank to facilitate a loan from the manufacturer. LG maintains that there is no evidence on the record of this case of such a close relationship with its unaffiliated suppliers.

LG further disagrees with the petitioner's assertion that Department should increase its reported manufacturing costs for the value of technical or financial assistance provided to these suppliers. LG maintains that there is no merit to the petitioner's argument that the entire amount of the loans should be treated as grants, or construed as additional costs incurred by LG that must be added to the cost of manufacturing. Moreover, LG argues, the suppliers are required to post collateral for these funds. LG asserts that the petitioner's argument on this issue is particularly confusing and contradictory, noting that the petitioner on one hand argues that LG has a close relationship with its suppliers because it requires collateral, and on the other hand that a close supplier relationship exists in part because LG does not require collateral.[50]

As to the petitioner's suggestion that the Department at the very least impute an interest cost to account for the time value of funds provided to suppliers, LG notes that it is well-established that the Department uses actual costs in calculating COP. LG maintains that its reported financing costs already account for the time value of any funds provided and that doing as the petitioner suggests amounts to double counting. Similarly, with respect to the technical assistance provided to its suppliers, LG asserts that the cost of such services are already included in its reported costs that were reconciled to the company's audited financial statements at verification.

The Department's Position:

We continue to find that LG and its top four material input supplies are not affiliated within the meaning of Section 771(33)(G) of the Act. In accordance with Section 771(33) of the Act, affiliated persons may be: (A) members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants; (B) any officer or director of an organization and such organization; (C) partners; (D) employer and employee; (E) any person directly or indirectly owning, controlling, controlled by, or holding with power to vote, five percent or more of the voting stock or shares of any organization and such organization; (F) two or more persons directly or indirectly controlling, controlled by, or under common control with, any person; and (G) any person who controls any other person and such other person." To determine affiliation between two companies, the Department must find that at least one of the criteria above is applicable.

Section 771(33) of the Act further provides that "{f}or purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." The Department's regulations at 19 CFR 351.102(b)(3) state that, in finding affiliation based on control, the Department will consider, among other factors: (i) corporate or family groupings; (ii) franchise or joint venture agreements; (iii) debt financing, and (iv) close supplier relationships. Control between persons may exist in close supplier relationships in which either party becomes reliant on one another. See, e.g., SAA at 838. With respect to close supplier relationships, the Department has determined that the threshold issue is whether either the buyer or seller has, in fact, become reliant on the other. Only if such reliance exists does the Department then determine whether one of the parties is in a position to exercise restraint or direction over the other. See, e.g., Wood Flooring and accompanying Issues and Decision Memorandum at Comment 21. The Department will not, however, find affiliation on the basis of this factor unless the relationship

[50] For further discussion, which includes business proprietary information, see the petitioner's case brief at pages 38-39.

has the potential to affect decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. See 19 CFR 351.102(b)(3).

Prior to the preliminary determination, in response to allegations from the petitioner, we solicited information from LG regarding its top suppliers of parts and sub-assemblies used in the manufacture of subject merchandise in order to analyze whether LG was affiliated with these companies based on a close supplier relationship that allowed LG to exert control or direction over these companies. See the Department's May 7, 2012, and June 18, 2012, supplemental Section A questionnaires. For the preliminary determination, we found that there was no evidence on the record to support a finding that LG controlled its top four input suppliers by means of a close supplier relationship. See Preliminary Determination, 77 FR at 46398-99.

Contrary to the petitioner's assertion otherwise, as explained in the Preliminary Determination, we examined several factors in analyzing whether LG was able to exert control or direction over its suppliers. Among the factors considered were: (i) the terms and provisions of supply agreements; (ii) the relative percentage that sales to LG represented of each of the suppliers' total sales; (iii) the terms of any financing agreements with the suppliers; and (iv) the overall profitability of the suppliers. See Preliminary Determination, 77 FR at 46398.

With respect to the terms and provisions of the supply agreements between LG and its input suppliers, we note that the contracts are short-term in nature. The Department's regulations at 19 CFR 351.102(b)(3) provide that we will consider the temporal nature of any relationship. In this case, the fact that the supply contracts LG executes with its suppliers are short-term and renewable at either party's option supports the Department's conclusion that LG is not affiliated with these companies. See e.g., Solid Urea from the Russian Federation: Final Results of Antidumping Duty Administrative Review, 76 FR 66690 (October 27, 2011) (where the Department examined franchise agreements between the respondent and its franchisees, concluding that the temporary nature of such agreements demonstrated that there was no close supplier relationship). Further, there is nothing in these contracts that prohibits the suppliers from selling to other buyers. In reviewing these contracts, we found that the language in the clauses therein provides no clear indication of control by LG over its input suppliers.

Another factor we considered in our analysis was the relative percentage that sales to LG represented of each of the supplier's total sales. Based on our review of the sales and purchase data provided by LG in its May 25, 2012, submission, none of the top four suppliers sold exclusively to LG. As noted above, a close supplier relationship is defined as one in which the buyer or the seller becomes "reliant" on the other. Here, however, record evidence regarding the suppliers' sales establishes that LG's input suppliers could, and did, look to other unaffiliated buyers of their goods, in contrast to the petitioner's argument. This fact belies the existence of a relationship in which the suppliers have become "reliant" on LG. Further, we note that, even in cases where one party sold all of its output to another, the CIT found that the Department reasonably concluded that there was no close supplier relationship. See TIJID, Inc. and Palm Beach Home Accents, Inc. v. United States, 29 CIT 307, 366 F. Supp. 2d 1286 (March 18, 2005) (TIJID) ("Commerce reasonably concluded that Fay Candle was not bound to only sell the subject merchandise to TIJID"). Moreover, all of the top four suppliers had an operating profit during 2011. We determine that the fact that all suppliers were profitable suggests that LG lacks the ability to influence or control the prices at which it purchases parts or assemblies for incorporation into subject merchandise.

While LG and its suppliers do cooperate closely, we do not consider this cooperation to demonstrate "reliance" for purposes of finding affiliation through control under section 771(33)(G) of the Act. There is no evidence on the record that LG's suppliers could not look to other buyers of their goods. In fact, as discussed above, the evidence clearly shows that these companies did so. See, e.g., LG's July 2, 2012, submission at page 7 (list of the suppliers' other buyers, all of whom are unaffiliated with LG). Any appearance of closeness arising from the relationship between LG and its suppliers is not the result of exclusive dependence on LG by its suppliers. Rather, it is the result of the high level of cooperation and convenience that LG and its suppliers employ in their commercial relations. The CIT acknowledged in TIJID that, even where there was a high level of cooperation between parties, one did not have the ability to exercise restraint or direction over the other.

As part of our analysis, we also examined the terms of any financing agreements with the suppliers. See LG's July 2, 2012, submission at Exhibits A-59 and A-60. According to these agreements, suppliers are required to post collateral for any funds received from LG in the form of credit guarantees from commercial banks. In this way, LG does not assume any risk of loss on a supplier's behalf. Further, we note that none of the inputs provided by these suppliers is unusual or unique, nor do they require specialized technology.

The petitioner alleges that the technical assistance provided by LG to its suppliers is indicative of a close supplier relationship. We do not find that the provision of technical assistance to suppliers demonstrates that the relationship between these companies constitutes a close supplier relationship in which LG was able to exert control over these companies. The petitioner also argues that LG transferred raw material at less than market prices to its suppliers, and that this bespeaks a close supplier relationship. As discussed in LG's June 18, 2012, submission and in the LG Cost Verification Report, the respondent transfers raw materials to its suppliers for incorporation into subassemblies that LG then purchases.[51] However, in reviewing the details of the transactions between LG and its suppliers related to these transfers and the manner in which the purchased subassemblies are ultimately recorded in LG's accounting records, we do not find there to be any basis for concluding that a close supplier relationship exits. See the LG Cost Calculation Memo for further discussion of this issue.

We do not find that Steel Pipe from Taiwan supports the petitioner's argument. In that case, there was clear and convincing evidence to support a finding of affiliation by means of a close supplier relationship and also through other means of control. For example, the respondent had full-time, unlimited access to its supplier's computer system, as well as physical custody of the supplier's signature stamp. See Steel Pipe from Taiwan, 62 FR at 37549. In addition, the

[51] See Memorandum entitled "Verification of the Cost Response of LG Electronics, Inc. in the Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea" (October 11, 2012) at 25.

supplier pledged its entire inventory and accounts receivable directly to the respondent's bank without any consideration, or even a written agreement memorializing the terms of the agreement. See id. at 37550; and Ta Chen Stainless Steel Pipe, Ltd. v. United States, 23 CIT 804 (CIT 1999) (affirming the Department's determination of affiliation through control).

Since the preliminary determination, there has been no information or argument submitted that compels us to reconsider our finding that LG and its input suppliers are not affiliated within the meaning of section 771(33)(G) of the Act. Further, even if the Department were to determine that LG and its suppliers were affiliated, we do not find convincing the petitioner's argument that the cost of manufacturing should be increased to account for the value of financial and technical services provided to the suppliers, as we verified that LG had accounted for all appropriate manufacturing, G&A, and financing expenses in its reported costs.

Comment 9: Request to Exclude a Certain Home Market Model

The petitioner contends that the Department should exclude all sales of a particular home market model ("model A") from the final margin calculation. The petitioner claims that, although the price and quantity for model A are aberrant and unrepresentative when compared to other home market models, this model matched to an "outsized proportion" of U.S. sales in the preliminary margin calculation. The petitioner argues that, had the Department tested the viability of the sales of model A used in the price-to-price comparison, the Department would have determined that they are aberrant outliers in price and quantity, and are not commercially viable to use as a comparison in the margin calculation. The petitioner argues that the Department regularly tests the viability of the data it uses in its margin calculations, as in the Department's home market viability test,[52] new shipper reviews,[53] cases involving potential revocation under section 751(d) of the Act, and when evaluating surrogate values in non-market-economy cases.

The petitioner includes data analyses in its case brief, purporting to demonstrate that: 1) sales of model A were aberrant in price and quantity when compared to LG's other home market models passing the sales-below-cost test; and 2) the amount by which the model passed the cost test is aberrantly low. The petitioner concludes that its analysis shows that model A is an outlier among other home market units and particularly among those which compare to U.S. sales. As such, the petitioner contends, model A is extraordinary within the meaning of 19 CFR 351.102(b)(35) (i.e., outside the ordinary course of trade) and should be excluded from the final margin calculation.

LG asserts that the Department thoroughly verified the accuracy of the product characteristics used to determine the CONNUM which includes the model at issue, as well as LG's reporting of the number of units sold in the home market of that model, and found no discrepancies. LG notes that

[52] See 19 CFR 351.102(b)(35).

[53] See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Review, and Final Rescission of Antidumping Duty New Shipper Review, 68 FR 1439, 1440 (January 10, 2003) and Windmill Int'l Pte., Ltd. v. United States, 193 F. Supp. 2d 1303, 1313 (CIT 2002).

Whirlpool acknowledged this fact in its case brief.[54] LG argues that the petitioner has based its argument entirely on misleading statistics in an effort to "cherry pick" results and inflate LG's dumping margin. LG provides a printout from its home market sales database, in which the models are listed according to LOT. LG observes that the model at issue was exclusively sold at LOT 2 (sales to retailers). LG asserts that the printout illustrates that the number of observations and total quantity for the model at issue are not the smallest of the 28 models listed as sold at LOT 2, and that there is nothing aberrational about this model when compared to the other models in the list.

LG claims that the petitioner's methodology for demonstrating the allegedly aberrational nature of model A is misleading because it compares model A only to home market models that were matched to U.S. sales. LG argues that one must evaluate where a given model falls in terms of the overall home market database before one can reach any conclusions on whether it is aberrational. LG claims that its own analysis shows that model A had a higher percentage of sales passing the cost test than some other home market models, while certain other models had no sales passing the cost test at all. LG contends that such a distribution is to be expected in a large database such as LG's, and that model A falls comfortably within the spectrum of models sold in the home market during the POI. According to LG, the petitioner uses the same misleading analysis by listing what appears to be a relatively low amount (in Korean won (KRW)) by which the net price of the model in question exceeds its total cost. Once again, LG argues, the petitioner incorrectly limited its analysis to the universe of home market models that matched to U.S. sales, and included in its calculation only those prices that were above cost for those models, rather than basing its analysis on all sales of all home market models in LG's database. LG provides a chart listing the minimum net price for all home market models, and points out that the price for the model at issue is well within the middle of the range of all models. LG adds that the petitioner's assertion that the model in question passed the cost test by an aberrationally low amount is also misleading because the assertion is based on absolute figures (in KRW) rather than on percentage terms. When percentages are considered, LG argues, it is evident that the amount by which model A's net price exceeded its cost falls within the range of percentages for all home market models.

In sum, LG argues that the petitioner's analysis is inherently flawed because it is limited only to those home market models that are above cost and that matched to U.S. sales. According to LG, when the full range of home market models is considered, the non-aberrational nature of model A is apparent, because it reflects the fact that some home market models did not pass the cost test at all. For these reasons, LG submits that the Department should reject the petitioner's arguments regarding this model, and should continue to use it in the final determination margin calculation.

<u>The Department's Position</u>:

We disagree with the petitioner that LG's home market sales of model A are extraordinary within the meaning of 19 CFR 351.102(b)(35), and should be eliminated from the final determination margin calculation. Section 773(a)(1)(B)(i) of the Act directs the Department to base NV on sales made in the exporting country or third-country market that are in the ordinary course of trade.

[54] <u>See</u> LG Home Market Sales Verification Report page 16.

The term “ordinary course of trade” is defined in the Act as “the conditions and practices which, for a reasonable period of time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.” Section 771(15) of the Act. Further, 19 CFR 102(b)(35) provides that:

> The Secretary may consider sales or transactions to be outside the ordinary course of trade if the Secretary determines, based on an evaluation of all of the circumstances particular to the sales in question, that such sales or transactions have characteristics that are extraordinary for the market in question. Examples of sales that the Secretary might consider as being outside the ordinary course of trade are sales or transactions involving off-quality merchandise or merchandise produced according to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm’s length price.

We examined several individual sales of model A at verification and found no discrepancies with the reported product characteristics, prices and quantities; nor did we note that the sales process and terms of sale for this model were unusual or extraordinary in any respect.[55]

Moreover, we disagree with the petitioner’s assertion that the prices for sales of model A are aberrational. In considering prices, we did not use the petitioner’s suggested methodology of comparing model A prices to prices for a specific subset of LG’s home market sales. The statute and the SAA are clear that a determination of whether home market sales (other than those that are below the COP or not at arm’s length) are within the ordinary course of trade must be based on an analysis comparing the sales in question with sales of merchandise of the same class or kind generally made in that market, and does not limit the analysis in the manner suggested by the petitioner.[56] Similarly, 19 CFR 351.102(b)(35) instructs us to consider the sales at issue in the context of “the market in question.” Therefore, to test the viability of the home market prices, we compared the gross unit prices for sales of model A to the gross unit prices for all other models sold in the home market during the POI, and found that prices for model A are well within the range of all home market sales prices as LG maintains.[57] With respect to sales volume, we acknowledge that LG sold fewer units of model A during the POI than of most (but not all) other models. We have stated previously, however, that low sales volume alone does not indicate that

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[55] See LGE SVR at 16 (“HM2, HM7, HM9, and HM10 sales involve a product that was matched to a significant number of U.S. sales in the Department’s preliminary determination...We observed no discrepancies in the reporting of the sales data for these transactions.”)

[56] See Gray Portland Cement and Clinker from Mexico, 71 FR 2909 (January 18, 2006), Issues and Decision Memorandum (Mexican Cement I&D Memo) at Comment 7; section 771(15) of the Act (defining ordinary course of trade), and the SAA at 834 (“Commerce may consider… sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market.”)

[57] See Mexican Cement I&D Memo (“we compared these sales to sales of all other types of cement…sold in the home market during the POR.”) See also LG’s net price analysis in Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea: LG’s Rebuttal Brief (November 7, 2012) at Exhibit O (LG’s Rebuttal Brief).

such sales are outside the ordinary course of trade, as sales volume is but one of many factors the Department may consider.[58] Finally, regarding the question of profit levels, we agree with LG that the proper analysis is to compare profit *rates* (i.e., the amount by which the model's net price exceeds its cost as a percentage of the cost of the model), rather than absolute values by which net prices exceed total costs.[59] As LG asserts, when profit rates are calculated and compared, the profit rate for model A falls within the range for all other models.[60]

For these reasons, we find no basis to conclude that sales of model A are aberrational or extraordinary within the meaning of 19 CFR 351.102(b)(35), and we have continued to use these sales in our final determination margin calculation.

Comment 10: Unreported Early Payment Discounts

The petitioner asserts that the Department determined at verification that LG failed to report early payment discounts for certain U.S. sales for which multiple sales of subject merchandise appeared on a single invoice. The petitioner argues that, where verification exposes that a respondent failed to report billing adjustments or to assign discounts in an accurate manner, the Department's practice is to make adverse inferences.[61] The petitioner contends that normally, the Department would apply the highest early payment discount rate to all transactions receiving the discount.[62] However, the Department verified that certain transactions should have received a particular discount rate.[63] The petitioner claims that this particular rate should be applied to all sales associated with an invoice containing multiple sales of subject merchandise, as it is the only available verified information on the record.

LG agrees that the Department discovered an error with respect to its early payment discount reporting, but argues that its error can be corrected readily with the verified information on the record, such that adverse inferences are not warranted. LG points out that the Department has already recognized this fact by requiring LG to revise its early payment discount reporting to incorporate the verified early payment discount information.[64] LG contends that the Department

[58] See Mexican Cement I&D Memo at Comment 7.

[59] See Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review, 76 FR 22867 (April 25, 2011) and accompanying Issues and Decision Memorandum at Comment 3 (the Department analyzed the distribution of profit rates in the respondent's data).

[60] See LG's Rebuttal Brief at 32.

[61] See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Belgium, 67 FR 62130 (October 3, 2002).

[62] See Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order; Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, 58 FR 39729, 39763 (July 26, 1993) (AFBs).

[63] See LGEUS SVR at 12.

repeatedly has declined to make adverse inferences in circumstances very similar to those in this case. LG cites several cases in which the Department concluded that adverse inferences were not warranted to correct inadvertently omitted information that was discovered during verification.[65] LG adds that it acted to the best of its ability to correct the error upon its discovery at verification, quickly determining the extent of the error and providing the Department with the information necessary to correct it in full. Therefore, section 776(b) of the Act does not authorize the Department to apply adverse inferences. LG also points to cases in which the courts have found that it is unreasonable for the Department to require completely errorless questionnaire responses, and that applying AFA is inappropriate if a minor or insignificant adjustment is involved or the gap in the record is inadvertent.[66] However, if the Department determines that adverse inferences are warranted, LG contends that the Department should apply the discount rate identified by the petitioner only to sales associated with invoices where at least one transaction featured an early payment discount.

The Department's Position:

We disagree with the petitioner, and have used the corrected, verified early payment discount information on the record in the final determination. It is the Department's practice to permit the correction of minor errors found during the course of verification.[67] Contrary to the petitioner's contention, the application of facts available with an adverse inference is not warranted in this case because there is no basis to conclude that LG failed to cooperate by not acting to the best of its ability, pursuant to section 776(b) of the Act. In AFBs, which the petitioner cites in support of the proposition that facts available should be applied, the respondent did not report its discounts in the manner required by the Department, which resulted in a dilution of the discounts actually received, in contrast to this case, where LG's error was corrected after it was discovered.[68] The facts of this case are analogous to those in the investigation of softwood lumber from Canada, where the Department identified an error in early payment discounts during verification, which the respondent was able to explain and quantify to the Department, and to provide corrected

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64 See the Department's Request for Revised Sales Databases (October 17, 2012) at Attachment 1.

65 See e.g., Lumber from Canada, and accompanying Issues and Decision Memorandum (Lumber I&D Memo) at Comment 42 (with respect to unreported early payment discounts, the Department stated, "It is the Department's practice to correct minor errors found during the course of verification."); and Stainless Steel Sheet and Strip in Coils from Taiwan,70 FR 7715 (February 15, 2005), and accompanying Issues and Decision Memorandum at Comment 7 ("…{the AD duty statute} provides the Department with discretion as to whether to act to correct insignificant errors. As the correct adjustments were easily calculated based on information already on the record, the Department has corrected U.S. insurance, banking charges, and U.S. brokerage and handling fees in calculating {the respondent's} final margin.")

66 See, e.g., NTN Bearing Corporation v. United States, 74 F. 2d 1204, 1208 (Fed. Cir. 1995); Nippon Steel Corp. v. United States, 146 F. Supp 2d 835, 841 n.10 (CIT 2001); and Ad Hoc Comm. Of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 865 F. Supp. 857, 865 n.22 (CIT 1994).

67 See Lumber I&D Memo at Comment 42.

68 See AFBs, 58 FR at 39762-3.

information. Thus, the Department used the corrected, verified information for the final determination.[69]

In this case, the Department thoroughly examined the nature of the error at verification, and confirmed that it was limited to a relatively small percentage of sales. Furthermore, LG explained how the error occurred and quantified the nature of the error to the Department's satisfaction, and the Department noted no discrepancies with the correction, as was stated in the verification report.[70] Therefore, we have declined to use, as AFA, the discount percentage suggested by the petitioner, and have used the corrected, verified early payment discount information on the record for the final determination.

Comment 11: Calculation of Profit Rate for Affiliated Logistics Services Provider

LG uses an affiliated company, Hi Business Logistics, Inc. (HiLo), to provide logistical services for home market and U.S. sales. Because LG's affiliate did not provide the same services to unaffiliated parties, nor did LG use unaffiliated companies for these services, we were unable to test the arm's-length nature of the expenses paid by LG. Therefore, in the Preliminary Determination, we based these expenses on the affiliate's costs, which we calculated by deducting from the reported movement expenses HiLo's profit rate that we derived from LG's questionnaire response.

LG submits that, in the Preliminary Determination, the Department relied on HiLo's gross profit rate, whereas the Department should have used HiLo's operating profit rate for making the adjustment, consistent with the Department's standard procedure to value freight supplied by an affiliated provider on the basis of the total cost of providing the services.[71] LG explains that the total cost of HiLo's services includes all SG&A expenses it incurred. Therefore, to derive the total cost of providing the services from the transfer price, HiLo's profit must reflect an amount after SG&A expenses have been deducted, which is the operating profit. LG points out that gross profit, in contrast, is calculated simply by deducting the cost of services from total revenues, in effect including the affiliate's SG&A expenses as an element of its profit.

LG adds that the Department relied on the operating profit rate to perform the same kind of adjustment in Refrigerators. Therefore, LG states that the Department should revise the expense adjustments by using HiLo's profit rate on services that it provided specifically to LG, as shown in its July 5, 2012, supplemental questionnaire response at Exhibit B-54 and LG Home Market Sales Verification Report at Exhibit 39. Alternatively, if the Department disagrees with the use of the LGE-specific rate, LG contends that the Department should use the overall operating profit rate of

[69] See Lumber I&D Memo at Comment 42.

[70] See LGEUS SVR at 1 and 12.

[71] LG cites to the Department's Antidumping Manual, Chapter 8 – Normal Value, at 21, stating that the Department's practice is to compare affiliated party transactions to "the actual costs incurred by the affiliated party." LG also cites to the Preliminary Determination, 77 FR at 46395, noting that foreign inland freight expenses were based on the affiliate's costs.

2.14 percent.[72]

The petitioner did not comment on this issue.

The Department's Position:

We agree with LG. Because there is sufficient information on the record to permit a more specific calculation, we adjusted LG's home market movement and foreign inland freight expenses using HiLo's operating profit rate on services provided to LGE. See, e.g., Polyethylene Retail Carrier Bags From Thailand: Final Results of Antidumping Duty Administrative Review, 76 FR 59999, (September 28, 2011), and accompanying Issues and Decision Memorandum at Comment 4, where the Department applied a constructed value (CV) profit rate based on the costs and profit of the subject merchandise, rather than the company-wide costs and profit. This adjustment is also consistent with the methodology employed in Refrigerators, where the Department adjusted a respondent's reported expenses to remove inter-company profit.[73] The Department's adjustment in this case is further discussed in the LG Sales Calculation Memorandum.

Comment 12: Treatment of Certain Selling Expenses and Rebates

In the Preliminary Determination, the Department disregarded LG's home market credit card interest support payments (reported as DIRSEL2H), and reclassified as indirect selling expenses the home market expenses associated with LG's gift card program (reported as REBATE7H) and a loyalty point program offered by LG's affiliated retailer, HiPlaza (reported as REBATE8H), because we questioned whether LG had allocated these expenses appropriately to home market sales.

LG argues that the Department should accept these expenses as direct selling expenses and rebates in the final determination. LG asserts that the Department has a long-standing practice of treating as direct selling expenses, expenses associated with promoting sales to the customers of a respondent's customer.[74] In such instances, LG argues, the tie between the expense and the sale to the respondent's customer's customer is less precise than an expense related to sales to the respondent's customer itself, and as a result, the Department has accepted broader types of allocations.[75] LG acknowledges that the expenses at issue cannot be tied directly to particular

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[72] Although LG requested proprietary treatment for this figure in its case brief, this information appears in the public version of its July 5, 2012, supplemental questionnaire response at Exhibit B-54 and Exhibit C-51.

[73] See Refrigerators I&D Memo at Comment 3.

[74] See e.g., Lightweight Polyester Filament Fabric From Japan; Final Determination of Sales at Less Than Fair Value, 49 FR 472 (January 4, 1984) at Respondent Comment 9 (rebates given to customer's customer treated as a direct selling expense); and High Information Content Flat Panel Displays and Display Glass Therefor From Japan; Final Determination; Rescission of Investigation and Partial Dismissal of Petition, 56 FR 32376 (July 16, 1991), at Comment 41 (the Department applied the customer's customer standard in evaluating whether to treat advertising as a direct or indirect selling expense.)

[75] LG cites to the Department's Antidumping Manual, Chapter 8 – Normal Value, at 44 ("{T}he Department recalculated Respondent's warranty expenses by allocating the total reported expenses for warranty claims in each

transactions, but claims that the programs fueled such sales by facilitating its customers' sales of washer inventory. LG adds that verified information is available that would permit a more limited allocation of credit card interest payments and gift card rebates.[76] For the credit card interest payments, LG suggests that the Department use the monthly amounts of the credit card interest support expenses to allocate these expenses to sales during the POI. Similarly, for gift card rebates, LG suggests these be treated as rebates, and that the Department use the monthly amounts of gift card rebates to allocate these rebates to sales during the POI. With respect to HiPlaza's loyalty point program, LG argues that the Department should treat this program as a rebate, and that its allocation methodology was sufficiently limited to warrant treatment as a rebate given the limited information in HiPlaza's books and records, and was as narrowly tailored to washer sales as HiPlaza's financial records would permit.

The petitioner argues the Department should treat credit card interest payment expenses and gift card rebates as indirect selling expenses. The petitioner argues that "direct selling expenses" are specified as those "that result from, and bear a direct relationship to, the particular sale in question."[77] The petitioner points out that LG acknowledges that the credit card interest payments cannot be linked to any individual sale, and adds that there is no evidence on the record to support LG's claim that it incurred these expenses as a direct result of washer purchases by LG's customers' customers. The petitioner argues that, as with the credit card interest payments, the gift card rebates should not be considered rebates because LG has not shown that the expenses are tied to specific customers, models, or time periods, or bear a direct relationship to the sale. With respect to HiPlaza's loyalty point program expenses, the petitioner argues that that the Department's established practice is to treat such expenses as indirect selling expenses, because they do not bear a relationship to a particular sale,[78] and they are targeted at the customers of LG's affiliate.[79] Accordingly, the petitioner argues, the Department should treat the expenses related to credit card interest payments, gift cards, and loyalty points as indirect selling expenses in the final determination.

The Department's Position:

Based on further review of the information on the record and our verification findings, we have reconsidered our preliminary treatment of the expenses related to LG's credit card interest support

market over the total quantity of sales made by ACA in each market.")

[76] See LG Home Market Sales Verification Report at Exhibits 34 and 49; and LG's August 13, 2012, Factual Information Submission at Exhibit B-75.

[77] See 19 CFR 351.410(c).

[78] See, e.g., Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review, 74 FR 47201 (September 15, 2009) at Comment 7.

[79] See Final Determination of Sales at Less Than Fair Value; Certain Internal-Combustion, Industrial Forklift Trucks from Japan, 53 FR 12552 (April 15, 1988) at Comment 84 (Forklifts) ("We are treating these expenses as indirect selling expenses since Komatsu and its dealers are related and, thus these expenses are directed as **[sic]** Komatsu's customers".)

payments and gift card program, and HiPlaza's loyalty point program. For the final determination, we have treated these expenses as either direct selling expenses or rebates, as discussed below.

As the petitioner points out and LG acknowledges, none of these expenses could be tied directly to particular transactions. However, with respect to LG's credit card interest support and gift card programs, we find that the associated expenses reflected promotional activities targeted to LG's customers' customers, similar to the promotional activities covered by direct advertising expenses, and are related to sales of subject merchandise.[80] As such, they bear a direct relationship to washer sales. LG incurs each of the expenses by supporting the sales promotional activities aimed at its customers' customers and pays for the promotional costs through a third-party provider. Thus, these expenses meet the definition of direct selling expenses under 19 CFR 351.410(d) as selling expenses "that are assumed by the seller on behalf of the buyer, such as advertising expenses."

With respect to HiPlaza's loyalty point program, we agree with the petitioner that, consistent with Forklifts, the expenses associated with this program may not be treated as direct selling expenses, because the promotional benefits are granted to the customer of LG's affiliate.[81] However, we agree with LG that these expenses may be treated as a rebate. LG reported an amount based on the value of loyalty points earned by HiPlaza's customers for their purchases from HiPlaza.[82] Among the types of transactions that the Department normally considers as rebates is the conveyance of some item of value by the seller to the buyer after the buyer has paid for the merchandise.[83] The loyalty points awarded to HiPlaza's customers upon purchasing washers and other goods represent the conveyance of an item of value from HiPlaza to its customers after the customers have paid for the merchandise.

Accordingly, in the final determination, we have treated each of the three expense variables at issue as either a direct selling expense or rebate, and we have included them as reported in LG's most recent home market sales database, in our calculation of NV.

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[80] See Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada, 70 FR 12181 (March 11, 2005), and accompanying Issues and Decision Memorandum at Comment 6 (The Department's normal practice with regard to determining whether advertising expenses are direct or indirect selling expenses is to apply a two-pronged test. First, the Department must determine if the advertising expenses are directed at the customer's customer. Second, the Department must determine if the advertising expenses are related specifically to sales of the subject merchandise.) See also LGE SVR at 28.

[81] See Forklifts, 53 FR at 12552.

[82] See LGE SVR at 26.

[83] See Notice of Final Results of the Seventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part, 70 FR 6832 (February 9, 2005), and accompanying Issues and Decision Memorandum at Comment 6, and the AD Questionnaire (March 5, 2012) at Appendix I (Glossary of Terms, "price adjustments").

Comment 13: Treatment of Affiliated Retailer's Operating Expenses

In the Preliminary Determination, the Department treated expenses incurred by HiPlaza (reported as DIRSEL7H), as indirect selling expenses "because they were related to rent, sales staff, salaries, and other overhead expenses and did not result from or bear a direct relationship to particular sales."[84] LG argues that expenses associated with HiPlaza retail outlets directly impact sales of washers by allowing consumers to view and learn about the product, in the same way as consumers view LG washers on the sales floor in other department stores, whose associated expenses the Department has accepted as direct selling expenses. LG adds that operating the retail outlets also allows LG to collect consumer marketing intelligence, which LG uses to maximize sales. LG argues that the Department's treatment of warranty expenses supports LG's position, because the Department does not require a direct link between the warranty expense and a particular sale, in recognition of the fact that, had there been no sale, there would have been no warranty expense. Therefore, LG asserts, the Department should reconsider its treatment of HiPlaza's expenses and treat them as direct selling expenses in the final determination.

The petitioner argues that the expenses related to operating HiPlaza stores would be incurred regardless of whether a sale is made. Thus, the Department correctly treated these expenses as indirect selling expenses in the Preliminary Determination. The petitioner notes that the Department reached the same conclusion with respect to the HiPlaza expenses in the Refrigerators Preliminary Determination.[85] The petitioner asserts that LG's characterization of the expenses as being related to marketing activities only confirms that they are general in nature, and would be incurred regardless of whether the sale of a specific washer occurred. Accordingly, the petitioner concludes, the Department should not alter its preliminary determination that these expenses are indirect, rather than direct selling expenses.

The Department's Position:

We agree with the petitioner, and have continued to treat HiPlaza's expenses as indirect selling expenses in the final determination. Direct selling expenses "result from, and bear a direct relationship to" the sales. See 19 CFR 351.410(c). Unlike direct selling expenses, such as the department store fees LG incurred and reported as DIRSEL5H, and warranty expenses, which are only incurred if a sale is made, the HiPlaza retail store expenses would have been incurred regardless of whether HiPlaza sold anything at all during the POI. As LG correctly notes, warranty expenses often cannot be tied to particular sales, however, they are considered to be direct selling expenses because they are incurred as a result of particular sales. Likewise, LG's DIRSEL5H expenses resulted from particular washer sales, and were in fact reported on a transaction-specific basis. In contrast, HiPlaza retail store expenses consisted of overhead

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[84] See Preliminary Determination, 77 FR at 46400.

[85] See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea, 76 FR 67675, 67685 (November 2, 2011) (Refrigerators Preliminary Determination).

expenses such as rent and sales staff salaries, and did not result from or bear a direct relationship to washer sales. Therefore, we continued to treat them as indirect selling expenses in the final determination.

Comment 14: Adjustment of Marine Insurance Premium Ratio

At verification, LG corrected its reported marine insurance expenses to reflect the ratio of the expense to the sales value of the merchandise, consistent with the Department's instructions. However, LG argues that the ratio should be adjusted further, as the expense in the U.S. sales database is based on the application of the marine insurance premium ratio to the sales price of the merchandise sold to LGEUS's customer, rather than to the transfer price value of the merchandise shipped from LGE to LGEUS. LG states that the marine insurance premium ratio was calculated based on LGE's export sales value (i.e., the transfer price value) and, therefore, the unadjusted amount overstates LG's marine insurance expense. Because the U.S. sales database does not include the transfer price value to which the marine insurance ratio should be applied, LG contends that the Department should adjust the reported expense by using the ratio of LGEUS's total cost of goods sold to LGEUS's total sales value, as reported in the LGEUS income statement,[86] as a reasonable estimate for the transfer price value.

The petitioner did not comment on this issue.

The Department's Position:

We agree with LG and have adjusted the marine insurance expense in the manner proposed by LG. See the LG Final Sales Calculation Memo.

Samsung

Comment 15: Fraud Allegation Against Samsung

In its July 25, 2012, fraud allegation the petitioner alleged that Samsung had engaged in fraudulent conduct by submitting falsified cost and home market sales data to the Department. To substantiate its allegation, the petitioner relied on the following:

1) documentation included in the verification exhibits from the home market sales verification of Samsung in the Refrigerators investigation;[87]

2) purchase data allegedly obtained from one of Samsung's home market customers (an informant customer);

3) an analysis of Samsung's reported home market prices to its retailer customers relative

[86] See July 5, 2012, supplemental questionnaire response at Exhibit C- 69. See also LGE SVR at 20.

[87] On July 24, 2012, at the Department's request, Samsung placed the verification reports and exhibits from the refrigerators investigation on the record of this investigation.

to retail prices included in market research data compiled by an independent research firm;

4) an analysis of Samsung's reported home market prices and costs relative to those of LG; and

5) Samsung's statements regarding home market prices in an investigation conducted by the Korean Fair Trade Commission (KFTC);

According to the petitioner, Samsung's home market prices are substantially lower than the prices shown on the documentation from the refrigerators investigation and the purchase data from the informant customer. Further, relying on comparisons to LG's data, the retail pricing data and Samsung's statements before the KFTC, the petitioner asserts that the record shows that Samsung has systematically reported falsified lower home market price and cost data. Finally, pointing to a separate investigation before the KFTC, the petitioner alleges that Samsung has a track record of providing false information to government regulators and providing false information to the Department would fit that pattern. See the petitioners July 25, 2012, submission.

Because the allegation was not received until shortly before our July 27, 2012, Preliminary Determination, we did not make a preliminary determination with respect to it. See Preliminary Determination, 79 FR at 46391. On July 27, 2012, we also received a response to the allegation from Samsung. Subsequent to the Preliminary Determination, we issued to Samsung a supplemental questionnaire related to the allegation and received a response from Samsung.[88] In addition, we received further comments from the petitioner regarding the allegation.[89] We also met with counsel to the petitioner and an accounting systems consultant with expertise in SAP[90] retained by the petitioner to aid in our preparation for verification of Samsung's home market sales and cost responses.[91] We also conducted sales and cost verifications of Samsung's reported data.[92] Finally, we requested to verify the information provided by the informant customer; however, this customer refused to participate in our verification.[93]

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[88] See Samsung's submission dated August 13, 2012.

[89] See the petitioner's submissions dated August 2, and August 24, 2012.

[90] SAP is an accounting software platform. The acronym "SAP" stands for "Systems, Applications and Products in Data Processing."

[91] See the August 29, 2012, memorandum to the file entitled "Ex Parte Meeting with Consultant and Counsel to Whirlpool Corporation," and the September 11, 2012, letter from Whirlpool Corporation, entitled "Submission of Presentation Slides."

[92] See the October 17, 2012, memoranda to the file entitled "Verification of the Sales Response of Samsung Electronics Co., Ltd." (Samsung Home Market Sales Verification Report), and "Verification of the Cost Response of Samsung Electronics Co., Ltd." (Samsung Cost Verification Report).

[93] See the September 12, 2012, letter from the law firm of Cassidy Levy Kent, LLP, entitled "Availability of Korean Retailer Informant for Verification."

In their respective case and rebuttal briefs, both Samsung and the petitioner comment on the allegation. As discussed in detail below, Samsung contends that the verified record evidence demonstrates that it has not provided falsified data to the Department and requests that the Department fully repudiate the petitioner's allegation, while the petitioner maintains that its allegation is supported by record evidence and urges the Department to apply total adverse facts available (AFA) to Samsung.

In its case brief the petitioner asserts that: 1) documentation included in the verification exhibits from the sales verification of Samsung in the refrigerators from Korea investigation; and 2) circumstantial evidence related to comparisons of Samsung's and LG's prices evidence a systematic falsification of Samsung's home market price and cost data.

Regarding the documentation on the record of the refrigerators investigation, the petitioner points to two instances where pricing information for washers, contained in the verification exhibits from the refrigerators investigation, appears to contradict the pricing information reported by Samsung in its home market sales listing in the instant investigation. First, the petitioner points to a one-page excerpt of a monthly invoice summary report which includes sales of washers, refrigerators, and other products issued by Samsung to Customer A[94] included in the refrigerators verification exhibits (the refrigerators version). The petitioner then compares the refrigerators version of this document to a five-page excerpt of the same monthly invoice summary that Samsung provided in its June 28, 2012, supplemental questionnaire response (the washers version), as well as to Samsung's home market sales listing. According to the petitioner, all washer transactions listed on the washers version tie to Samsung's home market sales listing, while the refrigerators version lists higher prices for all transactions involving washers (but the two versions matched with respect to all products other than washers).

Second, the petitioner points to a "billing list" document from the refrigerators verification exhibits, which includes multiple sales to Customer B, including the sale of a washer. The petitioner contends that the price shown on this document for the sale of a washer model is higher than the price reported in Samsung's home market sales listing for the same transaction. In both instances, the crux of the petitioner's allegation is that documentation generated before the instant investigation shows home market washer prices that are substantially higher than those reported in Samsung's home market sales listing. Moreover, the petitioner asserts that these two sets of conflicting sales documentation are the only instances where documentation for Samsung's washer sales transactions are included in both the current investigation and the refrigerators investigation. In the petitioner's view, the probability that the only two instances of documentation from the refrigerators record being subject to the type of adjustments Samsung asserts they are (see below for a full discussion of Samsung's characterization of the transactions, as well as the petitioner's response) is so infinitesimally small as to render Samsung's explanation implausible.

Regarding the sales documentation related to Customer A, Samsung contends that it fully

[94] Because the names of the customers involved in the allegation are proprietary, we cannot disclose their names in this memorandum.

explained the apparent discrepancy between the two sets of documents in its July 27, 2012, submission, only two days after receiving the petitioner's allegation. Samsung asserts that the two versions of the document were generated using different printing options within its SAP accounting system. Specifically, according to Samsung, the refrigerators version was printed such that all canceled transactions were excluded and all prices and adjustments were combined, while the version submitted in its June 28, 2012, supplemental questionnaire response listed prices and adjustments, including cancelations, separately. Samsung also contends that both versions of the full monthly invoice summary reports tie to its sales listing and to its books and records. With respect to the adjustments themselves, while the exact nature of the transactions is proprietary, Samsung asserts that it has fully documented and explained the nature of the adjustments, and why the only affected transactions were washers. See Samsung's October 31, 2012, case brief at 20-21. Finally, Samsung maintains that the Department fully examined these transactions at verification and found no inconsistencies with its explanation.

With respect to the sales documentation related to Customer B, Samsung similarly maintains that the petitioner's allegation was based on partial information, and that Samsung has fully explained and documented the circumstances surrounding this transaction. Specifically, Samsung asserts that the documentation in the refrigerators verification exhibits was a one-page screen shot of a three-page billing document. According to Samsung, the full billing document demonstrates that this sale was initially entered into its accounting system at the wrong price (i.e., the price shown on the one-page screen shot from the refrigerators verification exhibits). However, Samsung asserts that through a series of adjustments which are all reflected in the complete version of the billing document, the price was subsequently adjusted down to the correct price, the transaction was canceled by the customer, and then re-ordered by the customer. Based upon this documentation, Samsung maintains that it reported the final correct price for this transaction in its home market sales listing. Samsung contends that this explanation is documented on the record and was verified by the Department.

Regarding the explanations and documentation proffered by Samsung to explain the sales scenarios with both Customer A and Customer B, the petitioner maintains that both accounts are *post hoc* justifications that Samsung has manufactured to cover its tracks. Moreover, the petitioner asserts that neither is credible, and, at best, they reflect billing adjustments that were not disclosed to the Department.

The petitioner also points to a number of items, which it characterizes as "circumstantial evidence," which demonstrate a systematic understating of Samsung's reported home market prices and costs. First, the petitioner points to Enuri[95] retail price data for Samsung's home market washer models. The petitioner claims that these data show that the retail prices are unreasonably high relative to the prices charged by Samsung to its retailer customers, as reported in its home market sales listing (i.e., that the profit margin earned by the retailers is unrealistically high). Moreover, the petitioner asserts that the same comparison for LG shows that the retailer profit margin is substantially higher for Samsung's washers than LG's. According to the petitioner, this measure shows unrealistically high retailer profit margins because Samsung

[95] Enuri is a market research company that maintains Korean retail price information for consumer goods on a model-specific level. See Volume 1 of the December 30, 2011, Antidumping Duty Petition at 35.

fraudulently lowered its home market prices. Second, the petitioner compares Samsung's reported home market prices and costs to LG's prices and costs for identical or less-featured (i.e., more basic models with fewer advanced features) models. According to the petitioner, Samsung's prices and costs are lower than LG's, which is evidence of fraudulently-lowered prices. Third, the petitioner points to documentation from the KFTC regarding a price fixing investigation involving Samsung and a separate investigation in which Samsung was reprimanded for providing false information. According to the petitioner, testimony provided by a Samsung official in that proceeding regarding the profitable pricing levels for certain washers is at odds with Samsung's reported home market prices (i.e., Samsung's reported home market prices are lower than the level that would be profitable), while the KFTC reprimand shows a pattern of Samsung's penchant for disregarding the law and providing government authorities with falsified information.

In response to each of the above three pieces of "circumstantial evidence," Samsung asserts that these aspects of the allegation have no probative value and are not sufficient to override the fact that the Department successfully verified its sales and cost data. Regarding the Enuri data, Samsung contends that while these data reflect prices offered by retailers, they do not necessarily reflect actual final prices charged to retail customers, and therefore do not offer an accurate measure of the retailers' mark-up. With respect to the comparisons to LG's prices and COP, Samsung contends that there are differences between LG's and Samsung's products that are not necessarily captured by the Department's CONNUM categories. Moreover, Samsung asserts that the Department's cost verification findings confirmed that legitimate justifications exist for the differences in Samsung's and LG's costs and prices. Therefore, Samsung contends that comparing Samsung's prices and costs to LG's on a CONNUM basis is not meaningful. With respect to the KFTC reports, Samsung counters that Whirlpool's analysis considered only the retailer mark-up on its acquisition cost, and failed to consider selling and administrative expenses and profit. Samsung maintains that retailer mark-ups can be significant, which would undermine the petitioner's claim that high retailer mark-ups are indicative of artificially lowered reported prices. Samsung also responds that the KFTC reports do not demonstrate that Samsung has a track record for violating the law, as the facts of that investigation have no relationship to the facts in this case.

Fourth, the petitioner asserts that documentation from a third Korean retailer customer (an informant customer) that purchased washers from Samsung shows yet another instance of falsified prices. The petitioner notes that, because this customer declined to make itself available for verification, the petitioner was not relying on this information as "direct" evidence of fraud, but rather as corroboration of other verified record evidence. In response to this part of the petitioner's allegation, Samsung asserts that the Department cannot rely on this information because the informant customer refused the Department's request to be verified. Moreover, Samsung maintains that the Department should not rely on the informant customer's data because the information was likely obtained in violation of Korean law.

Fifth, the petitioner argues that Samsung's sales to its affiliated retailers initially passed the arm's-length test (and thus the retailers were not required to report their downstream retail sales), but when the Department preliminarily narrowed the scope of the investigation, some of the retailers no longer passed the arm's-length test. The petitioner alleges that this fact pattern shows that Samsung altered its home market prices such that it would not have to report its affiliates' retail sales. In its rebuttal comments, Samsung counters that there is no factual basis to support the petitioner's conclusion with respect to the arm's-length test. Rather, Samsung contends that, as the Department verified, it reported accurate sales data for its sales to its affiliates, and that sales to these customers failed the arm's-length test only after the petitioner chose belatedly to modify the scope of the investigation.

Finally, the petitioner points to documentation from the refrigerators cost verification exhibits regarding Samsung's washer production costs in the fourth quarter of 2010. According to the petitioner, these costs are substantially lower than Samsung's reported costs for the same period in this investigation. Additionally, the petitioner maintains, Samsung's explanation for this difference (i.e., that the refrigerators documentation related to completed washers as well as component parts, while the documentation provided in this investigation related only to finished washers) is not credible. In its rebuttal comments, Samsung responds that the Department fully verified its reported cost data. Moreover, Samsung asserts that the Department verified that the washer production costs from the refrigerators investigation corresponded to completed washers and washer parts, while in this investigation Samsung's reported washer production costs only included costs for finished goods because parts are not within the scope of the investigation.

With respect to our verifications of Samsung's home market sales and cost data, the petitioner maintains that, despite the fact that our verification reports noted no evidence of falsified data, we should nonetheless apply total AFA to Samsung. Specifically, the petitioner asserts that due to Samsung's sophistication and the complexity of its accounting system, the Department's verification was a meaningless and futile exercise incapable of detecting Samsung's fraud. Moreover, the petitioner argues that our verifications were conducted within "the four corners" of Samsung's accounting system and the only verification techniques that could have uncovered Samsung's fraud were 1) employing a SAP "BASIS"[96] expert to conduct a forensic audit of Samsung's accounting system, and 2) verifying the purchase records of a third party retailer customer of Samsung. Because our verification failed to take either of these steps, the petitioner contends that we should find that Samsung reported falsified information to the Department and apply AFA to Samsung.

In response, Samsung maintains that every piece of verified record evidence demonstrates that it did not engage in any fraudulent conduct, and to apply AFA to it would require that the Department completely disregard the results of its verifications. Furthermore, Samsung argues that the Department's verifications were not constrained to "the four corners" of its accounting system because the verifications involved tying information in Samsung's accounting system to information outside this system, such as tax invoices, tax invoices from suppliers, bank statements, purchase data obtained at a "surprise" verification visit to one of Samsung's affiliated customers, and Samsung's engineering system. Samsung also asserts that the petitioner's claim that the Department's verifications were ineffective because the Department failed to hire an outside expert is unavailing. On this point, Samsung notes that the Department did meet with the

[96] According to the petitioner "BASIS" is the SAP term for the system administration aspect of the SAP software package and an SAP basis expert would have the ability to get behind the accounting data to determine if it had been falsified. See the Petitioner's September 11, 2012, filing entitled "Submission of Presentation Slides."

petitioner's SAP expert, who provided a detailed roadmap for the Department's verifiers to follow at verification. According to Samsung, the Department performed all of the tests outlined by the expert and that Samsung could not have prepared for these tests. Thus, Samsung contends that the verified record evidence establishes that it did not provide falsified data to the Department and, thus, imposing AFA would not be appropriate.

The Department's Position:

After considering the petitioner's allegation, Samsung's response, our findings at verification, and the arguments presented in the parties' respective case and rebuttal briefs, we have determined that the application of AFA to Samsung is not supported by the record evidence in this investigation. As discussed above, the essence of the petitioner's fraud allegation is that certain documentation generated prior to the instant investigation and provided by Samsung to the Department in the refrigerators investigation contradicted the information reported to the Department in this investigation. Based on this limited documentation and its own analysis of Samsung's reported prices and costs vis-à-vis third party pricing data and another respondent's data, the petitioner concluded that Samsung had engaged in fraudulent manipulation of its accounting system to systematically falsify its entire accounting system (i.e., either through report writing manipulations or a complete duplication and alteration of its SAP system) in order to report falsely-deflated home market prices and costs. Thus, for the petitioner's allegation to be credible: 1) the alleged discrepant documentation from the refrigerators record must not reconcile to the information reported in this investigation; and 2) Samsung's accounting system must have been manipulated to reflect artificially-low COP data and prices for its home market washer sales. As discussed below, neither requisite finding is supported by the evidence on the record of this investigation.

Due to the gravity of the petitioner's allegation, we devoted substantial investigative time and resources to evaluate the allegation and Samsung's response. Specifically, we reviewed the verification exhibits from the refrigerators investigation on the record of this proceeding and identified two additional instances of washers data in those exhibits: 2010 sales value information and COP figures for the fourth quarter of 2010. Both figures represented washer data that were generated by Samsung prior to the initiation of this investigation and should tie to information reported by Samsung in this investigation. Accordingly, on August 1, 2012, we requested that Samsung reconcile these two items with the information reported in this investigation, as well as provide further documentation and explanation regarding the conflicting sales documentation identified by the petitioner. Samsung provided a complete and documented response to this questionnaire on August 13, 2012.

Additionally, recognizing the importance of verification in evaluating whether Samsung had provided falsified data, we postponed Samsung's home market sales and cost verification to ensure we were adequately prepared to verify fully Samsung's data and weigh the merits of the petitioner's allegation. Moreover, we met with counsel to the petitioner and the petitioner's SAP systems expert to aid us in our preparation for verification.[97] Furthermore, we staffed the home

[97] See Memorandum entitled "Ex Parte Meeting with Consultant and Counsel to Whirlpool Corporation," dated August 29, 2012.

market sales verification with two sales analysts and two accountants, and tailored our verification procedures to specifically address this issue. With respect to the sales verification itself, in our verification agenda we requested that Samsung allow us to verify on-site at Customer A's location (for further discussion, see "Comment 16," below). We also conducted a "surprise" (i.e., not identified in our verification agenda) visit to another of Samsung's affiliated home market customers and performed numerous "surprise" testing procedures not disclosed to Samsung in the verification agenda, including the very procedures recommended by the petitioner's SAP expert. With respect to our findings at verification, as made clear in both the home market sales and cost verification reports, after extensive testing of Samsung's accounting system, the allegedly discrepant transactions, Samsung's sales data and documentation, and its COP information, we found no evidence of falsified data or fraudulent conduct.

Nonetheless, the petitioner asserts that we should disregard our findings and apply total AFA to Samsung. First, the petitioner contends that Samsung's explanation and supporting documentation for the two sales documents from the refrigerators investigation are not credible and represent improbable instances of sales subject to abnormal adjustments. However, we disagree. Samsung provided its explanation and source documentation within two days of receiving the petitioner's allegation, and its explanation was fully supported by documentation and withstood our extensive verification. While both instances certainly reflect fact patterns and adjustments that are not standard to Samsung's selling practices, the fact remains that both sets of documents were fully supported and verified. For example, we traced the sales shown on the schedule containing Customer A's sales through the SAP system and observed the invoice printing options, which explained the difference between the two versions of the document. Specifically, depending on the options selected, Samsung generated one version that displayed only the final prices net of adjustments, and another that listed each price and adjustment separately.

We also tied the sale to Customer B, including the various adjustments, to the underlying SAP metadata for the sale showing when the sale and adjustments were entered into Samsung's SAP system. In addition, we tied the sales to both Customer A and B to supporting documentation outside the SAP system, including tax invoices issued to the customers and payment documentation, including Samsung's bank statement (i.e., accessed via the unaffiliated bank's website showing the receipt of payment).[98] Moreover, while the petitioner would have us apply AFA based on the improbability of these sales involving adjustments, we cannot reasonably deny substantial evidence on the record that indicates an explanation for the discrepancies in favor of a claim that the discrepancies are improbable.

Next, the petitioner asserts that we should disregard our verification findings because we were limited to the "four corners" of Samsung's SAP accounting system, and any attempt to uncover fraud within that box was a meaningless and futile exercise. Again, we disagree. At the home market sales verification, we tied significant aspects of Samsung's SAP system to information outside the system and, thus, we were not limited to the four corners of the system. For example, we tied selected sales (including the alleged discrepant transactions) to payment documentation,

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[98] For a full discussion of these transactions see the Samsung Home Market Sales Verification Report at 19-21 (related to Customer A) and 21-22 (related to Customer B).

including Samsung's bank statement, and tax invoices provided to the Korean government.[99] We also tied a sale to a hard copy order from one of Samsung's customers.[100] While the petitioner discounts this element of our verification because the order was between Samsung's customer and the customer's downstream retail purchaser (and the customer only forwarded the order to Samsung for fulfillment), the petitioner does not address the fact that the price on the retail order matches the price Samsung reported. In other words, if the petitioner's allegation were correct, one would expect the retail order price to be substantially higher than Samsung's reported price to the retailer.

Significantly, we also tied Samsung's 2010 washers sales value included in its SAP system and sales reconciliation worksheets to the identical value included in the refrigerators investigation, which was prepared prior to the filing of the petition in this investigation.[101] We also made a "surprise" visit to one of Samsung's affiliated retailers where we tied Samsung's reported sales data to its affiliate's purchase data.[102] Here, the petitioner downplays the importance of this portion of our verification based on the fact that the affiliate operated on the same accounting platform as Samsung. However, neither Samsung nor the affiliate would have reasonably anticipated our testing of the affiliate's purchase data; nor would Samsung have had reason to extend its purported fraud to its affiliate's books and records in anticipation of verification. Thus, the fact that the affiliate's data tied to Samsung's reported data demonstrates that Samsung did not falsify its data. Therefore, the home market sales verification extended beyond the four corners of Samsung's SAP accounting system and revealed no evidence that Samsung had perpetrated the fraud that the petitioner alleges.

We also conducted extensive portions of our cost verification outside the four corners of Samsung's accounting system. Specifically, without prior notification in our verification agenda, we requested that Samsung provide an engineer who could explain the design process for Samsung's washers. After the engineer explained that the product design process occurs in a system which is independent from the SAP system, we obtained bills of materials (BOMs) from the engineering system.[103] To confirm the cost of all materials which appeared on the BOMs from the engineering system, on a material-input specific basis, we tied the BOMs obtained from the engineering system to the BOMs reported to the Department from the SAP system. To verify the price of those input materials, for two of the washer models selected for individual examination, we identified each material input with a meaningful value and obtained inventory movement records, purchase records, unaffiliated supplier invoices, and payment details which we tied to Samsung's bank statement.[104] Each of the above verification items involved tying

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[99] See the Samsung Home Market Sales Verification Report at 19-22.

[100] Id., at 12.

[101] Id., at 18.

[102] Id. at 31-33.

[103] See the Samsung Cost Verification Report at 32-33.

[104] Id. at 35.

elements from within the four corners of Samsung's SAP system to supporting documentation outside of it. Through this testing we were able to verify the input quantities and valuation of almost the entire cost of manufacturing for the selected models. Additionally, we reconciled the portion of Samsung's cost data attributable to the last three months of 2010 to the cost-reconciliation materials obtained during the refrigerators investigation.[105] Accordingly, a substantial portion of the cost verification was conducted outside the four corners of Samsung's SAP accounting system and we found no evidence of the manipulation alleged by the petitioner.

In short, we are not in a situation where we are weighing competing bodies of verified evidence: one which withstood verification and one that points towards possible falsified data.[106] Rather, all of the verified evidence supports the conclusion that Samsung neither falsified documentation related to the washers sales included in the refrigerators verification exhibits nor systematically falsified its entire SAP accounting system to report false sales and cost data in this investigation. Accordingly, we cannot disregard our verifications and jettison the verified facts in favor of AFA.

The petitioner also faults our verifications for our decision not to employ an outside forensic accounting expert with SAP BASIS experience to participate in our verifications. However, we consulted with the petitioner's retained SAP expert and followed the specific verification steps he outlined (i.e., those designed to detect manipulation through report writing schemes and those designed to detect if we were being shown an offline duplicate SAP system). In so doing, we detected no manipulation of Samsung's accounting system. Notably, the petitioner has not identified any concrete steps that we failed to take in conducting our verification; rather, the petitioner baselessly asserts that an individual with the requisite skills would have somehow been able to take further unspecified measures to uncover Samsung's alleged fraud.[107] Most importantly, our testing demonstrated conclusively that Samsung had not employed the fraudulent techniques identified by the petitioner. Specifically, our testing, which went across the different modules within Samsung's SAP system and tied entries at the transaction-level to the overall sales and cost data reported at the financial-statement level demonstrates that Samsung did not engage in fraudulent report writing that could have avoided our detection. Also, we verified that the SAP system Samsung was showing to us was in fact "live" (i.e., it was linked to present-day data).[108] Therefore, we were viewing and conducting verification procedures using the primary SAP database and system and not a duplicated and/or altered version. Additionally, our surprise visit to Samsung's affiliate revealed that Samsung's data tied to data from its affiliate, which would

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[105] Id. at 25-26.

[106] See, e.g., Globe Metallurgical Inc. v. United States, 865 F. Supp. 2d 1269, 1271 (CIT 2012) (holding that Commerce's determination must be supported by substantial evidence, based on the record as a whole).

[107] See Micron Tech. v. United States, 117 F.3d 1386, 1396 (Fed. Cir. 1997) (holding that "Congress has implicitly delegated to Commerce the latitude to derive verification procedures *ad hoc*. Since the action rests upon an administrative determination… of course it must not be set aside because {we} might have made a different determination were {we} empowered to do so") (internal citations omitted). We also note that the petitioner has not alleged that Commerce did not follow its verification procedures.

[108] See the Samsung Cost Verification Report at pages 21 and 26 and the Samsung Home Market Sales Verification report at pages 9 and 15.

have had no reason to anticipate our verification. Accordingly, to continue to believe the petitioner's allegation, one would have to conclude without any record support that Samsung altered its primary books and records (and not a duplicate set), falsified numerous records and documents outside its SAP system, and did so across affiliated entities in such a way as to avoid detection. Such conclusions go well beyond the scope of the petitioner's allegation and are not supported by any record evidence. Consequently, because we were able to test fully Samsung's SAP system and reported data, the absence of an outside SAP BASIS expert does not undermine our verifications, let alone justify disregarding *in toto* the findings of our thorough verifications to apply AFA.

While verifying the purchase records of a third-party retailer customer of Samsung (i.e., Customer A), the other element which the petitioner alleges was missing from our verification, would have been a useful procedure to test Samsung's data, we disagree that the absence of this element is grounds for AFA. As the initial matter, as discussed in detail in Comment 16, below, we find that Samsung was not in a position to compel Customer A to participate in our verification. Accordingly, we are not applying AFA with respect to Samsung for Customer A's refusal to be verified. Furthermore, because Customer A had no reporting obligation to the Department, there is no information on the record from Customer A that we were unable to verify; rather, we fully verified Samsung's reported data, and a verification of Customer A would have constituted a supplementary verification procedure. Finally, we note that we also verified Samsung's reported data at a different affiliated customer (i.e., Customer B), which, although not an exact replacement for the verification of Customer A, does support the conclusion that Samsung did not falsify its reported data.

With respect to the petitioner's "circumstantial evidence," we find that none of these elements of its allegation justifies applying AFA in light of the verified record evidence. First, with respect to the data provided by the informant customer, we find that we are unable to give any weight to this information in evaluating the petitioner's fraud allegation because this customer refused our request to verify the information it provided. Section 782(i) of the Act provides that the Department "shall verify all information relied upon" in a final determination in an AD investigation, and the Department's regulations at 19 CFR 351.307(b)(1) state that "the Secretary will verify factual information upon which the Secretary relies" in an AD investigation. The Department's verification, like an audit, tests for "accuracy and completeness."[109] Here, the informant customer did not permit the Department to test any element of the information it provided. Moreover, as communicated to counsel to the petitioner, we indicated that we requested verification "in order to consider {the informant's data} in our final determination."[110] Consequently, we find that it would not be appropriate to rely on the informant's data given the informant's refusal of our request to verify and our obligation to verify the information upon which we rely in this investigation.

Thus, we do not agree with the petitioner that the facts of this case are similar to other instances in

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[109] See Bomont Indus. v. United States, 733 F. Supp. 1507, 1508 (CIT 1990).

[110] See the September 6, 2012, letter from James Maeder, Office Director, to counsel to the petitioner.

which we have applied total AFA based on an allegation of fraud, which was either confirmed by the Department's verification, or later admitted to by the respondent.[111] In such cases, we agree that the application of total AFA, pursuant to section 776(b) of the Act, is appropriate, but in this case, we have no evidence of fraud or that Samsung failed to cooperate by not acting to the best of its ability.

With respect to the petitioner's claim that Samsung's fraud is evidenced by the fact that Samsung's sales to its affiliated retailers initially passed the arm's-length test only to fail once the Department preliminarily narrowed the scope of the investigation, we disagree that this is evidence of fraud. As discussed above, our verifications revealed no evidence of falsified data and any tangential effects of the petitioner's revision to the scope of the investigation do not support the application of AFA.

Regarding the analysis of Samsung's prices and costs of production relative to the Enuri retail prices and LG's prices and costs, we find that these elements of the petitioner's allegation are not evidence of fraud on their own. Had we uncovered evidence of manipulation or falsified data on the part of Samsung, these elements may have lent credence to the petitioner's allegation; however, absent a finding of fraud with respect to Samsung's actual reported data, these elements of the allegation are speculative and do not warrant the application of AFA. Moreover, any number of justifications could exist for why prices, costs, and retailer profit margins could differ across manufacturers.

Indeed, the Samsung cost verification report at pages 35-36 identifies such possible justifications. In fact, while the petitioner alleges that Samsung's low costs indicate fraudulent reporting, our verification of Samsung's costs indicates that Samsung's prices were low because it is a low-cost producer by virtue of its patented technologies. We note that, although the petitioner attempts to discredit Samsung's explanation on this point by pointing to the costs Samsung and LG reported for specific material inputs, the petitioner's comparisons are not persuasive because the comparisons are made between wholly dissimilar inputs, which are reflected in the Department's model-matching criteria. Due to the proprietary nature of these comparisons, see the Samsung Cost Calculation Memo. Similarly, with respect to the KFTC reports cited by the petitioner, we find that these reports, issued by another government on an unrelated matter, do not override the verified evidence on the record of this proceeding. Consequently, based on the foregoing, we have not applied total AFA to Samsung in our final determination.

Comment 16: Request to Apply Adverse Facts Available to Samsung for Its Affiliate's Conduct

During the POI, Samsung sold washers to multiple affiliated retailers in its home market. One of these affiliated customers is Customer A, discussed above in Comment 15. Accordingly, in our verification outline,[112] we requested that Samsung make this company available for verification

[111] See the petitioner's case brief at pages 25-26, citing Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 11085 (March 16, 2009), and Certain Steel Grating from the People's Republic of China, 75 FR 32366 (June 8, 2010).
[112] Prior to issuing the verification outline, on August 28, 2012, we notified counsel to Samsung of our intention to verify Customer A.

such that we could verify its purchase data to test whether its purchase prices matched Samsung's reported sales prices. See the August 31, 2012, Samsung Home Market Sales Verification Agenda at page 10. However, two business days prior to verification, counsel to Samsung notified the Department that Customer A refused to submit to verification. See Samsung's letter to the Department, dated September 6, 2012. In this letter, Samsung outlined its efforts to convince Customer A to allow verification, including phone calls and emails from Samsung managers to managers at Customer A. In response, we notified Samsung again of the importance of this element of our verification and requested that Samsung make a further attempt to convince Customer A to allow us to verify its purchase information. See the September 6, 2012, email from James Maeder, Office Director, to counsel to Samsung. However, following a meeting between representatives from Samsung and Customer A, Samsung informed us that its further attempt was unsuccessful and we would not be able to verify Customer A's purchase data. See Samsung's letter to the Department, dated September 7, 2012.

The petitioner asserts that we should apply AFA to Samsung by virtue its affiliated customer's refusal to participate in our verification and Samsung's failure to exert its best efforts to convince this customer to comply with our request. Samsung counters that it should not be penalized for Customer A's refusal to participate because Samsung put forth its best efforts to convince Customer A to participate, but Customer A was under no obligation to report any data to the Department. Moreover, Samsung asserts that it was not in a position to exert control over Customer A because: 1) Samsung has no significant stock ownership in Customer A; 2) there is no managerial overlap between the two companies; and 3) the two companies have an acrimonious relationship with one another and are involved in a legal dispute.

The Department's Position:

Because Samsung had no significant stock ownership in Customer A, there is no managerial overlap between the two companies, and the two companies are involved in a legal dispute, we have determined that Samsung was not in a position to compel its affiliate to participate in our verification. Moreover, we have determined that Samsung did put forth significant efforts to convince Customer A to participate in our investigation. Accordingly, we have not applied AFA to Samsung and have relied on Samsung's data, as reported and verified, in our final determination. Because the identity of Customer A (and therefore the nature of the affiliation between the two companies) is business proprietary, see the memorandum entitled "Further Discussion of Comments 16-19 in the Issues and Decision Memorandum," dated December 18, 2012, for further discussion, which is incorporated by reference.

Comment 17: Alleged Unforeseen Event

In the Preliminary Determination, we did not consider the event as described by Samsung to be unforeseen or extraordinary; therefore, we classified the expenses related to the event as warranty expenses and included them in our calculation of CEP. We have continued to treat these expenses as warranty expenses for the final determination. Because the details relating to these expenses are business proprietary, see the memorandum entitled "Further Discussion of Comments 16-19 in the Issues and Decision Memorandum," dated December 18, 2012, for further discussion.

Comment 18: U.S. Sales Transactions Affected by the Alleged Unforeseen Event

In the Preliminary Determination, we included in our calculation of CEP certain U.S. sales affected by an allegedly unforeseen event, including certain sales that Samsung contends were sold before the POI. We preliminarily determined that these sales were made during the POI and, therefore, we included them in our preliminary margin analysis. We have continued to include these sales in our final determination margin calculations. Because the details relating to these expenses are business proprietary, see the memorandum entitled "Further Discussion of Comments 16-19 in the Issues and Decision Memorandum," dated December 18, 2012, for further discussion.

Comment 19: Date of Sale for Samsung's Direct Shipment Sales

For purposes of the Preliminary Determination, the Department excluded certain sales affected by the allegedly unforeseen event which were shipped directly from Korea to U.S. customers. We have continued to exclude these sales from our final determination margin calculations. Because the details relating to these expenses are business proprietary, see the memorandum entitled "Further Discussion of Comments 16-19 in the Issues and Decision Memorandum," dated December 18, 2012, for further discussion.

Comment 20: Duty Drawback

In the Preliminary Determination, we disallowed Samsung's claimed duty drawback adjustment because we determined that Samsung had not included the duties drawn-back upon export in its reported costs. See 77 FR at 46391, 46396. We also explained that, although Samsung had responded to the Department's request to include the drawn-back duties in its reported costs, the relevant information was received too late for use in our preliminary margin calculation. Id. at 27. Moreover, we stated in the Preliminary Determination that we would verify the information and consider it for use in the final determination.

Samsung argues that the Department should grant Samsung's claimed duty drawback adjustment because the information has been verified as accurate and complete. Samsung acknowledges that, in cases such as Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results of Antidumping Duty Administrative Review and New Shipper Review and Notice of Intent to Revoke in Part, 72 FR 25253, 25258 (May 4, 2007) unchanged in Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of New Shipper Review, 72 FR 62628, 62630 (November 6, 2007), the Department has increased the respondent's reported COP to reflect the amount of duties which would have been included in its costs but for the final product's subsequent exportation. Accordingly, Samsung states that if the Department determines that an adjustment is necessary to include duties for export models in the COP, the Department should rely on the revised cost database submitted on October 31, 2012, for the final determination.

The petitioner did not comment on this issue.

The Department's Position:

For the final determination, the Department has granted Samsung's claimed duty drawback adjustment, pursuant to section 772(c)(1)(B) of the Act. The Department disallowed this adjustment in the Preliminary Determination because the cost database used for the Preliminary Determination did not include the duties which would have been included in Samsung's costs but for the final product's exportation, and the information pertaining to the omitted costs was not submitted in time for use in the Preliminary Determination. See Preliminary Determination, 77 FR at 46396. During the verification of Samsung's questionnaire responses, the Department confirmed the accuracy of the information Samsung submitted pertaining to its calculation of the duty drawback amounts. See Samsung Home Market Sales Verification Report at page 25. Additionally, consistent with our practice, we have included in our cost calculations the duties for raw materials which would have been incurred by Samsung but for the final product's subsequent exportation. See Saha Thai Steel Pipe (Public) Co., Ltd. v. United States, 635 F.3d 1335, 1342 (CAFC February 14, 2011), the Federal Circuit stated that "{w}e agree that Commerce reasonably decided that any increase to EP pursuant to a duty drawback adjustment should be accompanied by a corresponding increase to COP and CV." See also Polyethylene Retail Carrier Bags From Thailand: Final Results of Antidumping Duty Administrative Review, 76 FR 12700 (March 8, 2011), and accompanying Issues and Decision Memorandum at Comment 5.

Comment 21: Adjustment to the Selling, General & Administrative Expenses of Affiliated Suppliers

In the Preliminary Determination, the Department analyzed Samsung's purchases from its largest affiliated suppliers by comparing the transfer prices to the sum of the affiliates' acquisition cost, SG&A expenses, and financial expenses. As a result, the Department determined that it was not necessary to adjust Samsung's reported costs, pursuant to section 773(f)(2) of the Act, because the transfer prices were representative of arm's-length transactions.

Samsung argues that, even though the Department noted in the cost verification report, that the affiliated suppliers' SG&A rates would increase if the Department used the affiliates' company-wide G&A expense rates rather than the procurement-division G&A rates, the Department should conclude that no adjustment to Samsung's reported costs is necessary for the purpose of the final determination. Specifically, Samsung submits that, even though revised calculations would raise the amount of the transactions-disregarded adjustment slightly, section 777A(a)(2) of the Act provides that the Department may decline to take into account insignificant adjustments. Additionally, citing 19 CFR 351.413, Samsung argues that the Department's regulations define "insignificant adjustment" as "any individual adjustment having an *ad valorem* effect of less than 0.33 percent." Accordingly, Samsung asserts that the Department should simply disregard the adjustment for the final determination.

The petitioner did not comment on this issue.

The Department's Position:

Although section 777A(a)(2) of the Act provides the Department with the discretion to disregard insignificant adjustments and the recalculated transactions-disregarded adjustment is below the significance threshold set forth in section 351.413 of the Department's regulations, we have recalculated Samsung's transactions-disregarded adjustment for this final determination. The Department has explained previously that, for the purposes of section 773(f)(2) of the Act (the transactions-disregarded rule), the Department's established practice when the respondent purchases inputs from an affiliated reseller is to value the input at the higher of the transfer price or the adjusted market price for the input (i.e., the affiliate's average acquisition cost plus the affiliate's SG&A costs). See Refrigerators from Mexico at Comment 28. The Department has also explained that, in instances where the affiliated supplier functions as a middleman between the respondent and the unaffiliated producer, the Department uses the affiliate's company-wide G&A-expense rate as a component in its calculations rather than the G&A-rate of the division responsible for such transactions. Id. Accordingly, for this final determination, the Department has followed its standard practice and recalculated Samsung's transactions-disregarded adjustment in accordance with our findings at verification.

Comment 22: Product Characteristic Coding

Samsung explains that, during the cost verification, the Department identified one error in Samsung's product characteristic assignments which affected Samsung's reported costs. Samsung argues that, because the Department has requested and received a revised cost database which corrects this minor error, the Department should calculate Samsung's final dumping margin using the revised cost database submitted on October 31, 2012.

The petitioner did not comment on this issue.

The Department's Position:

For this final determination, we have used the cost database which Samsung submitted on October 31, 2012, pursuant to our instructions, which incorporates our findings at verification.

Recommendation:

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

Agree ✓ Disagree _______

Paul Piquado
Assistant Secretary
for Import Administration

18 DECEMBER 2012
(Date)