



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

A-580-855  
Administrative Review  
POR: 1/23/2009-10/31/2010  
**Public Document**  
AD/CVD-01: SB

DATE: February 8, 2013

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 Final Results in the First  
Antidumping Duty Order Administrative Review of Diamond  
Sawblades and Parts Thereof from the Republic of Korea

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## **SUMMARY**

We have analyzed the case briefs and comments submitted by interested parties in the administrative review of the antidumping duty order on diamond sawblades and parts thereof from the Republic of Korea. As a result of our analysis, we have made certain changes in the margin calculations. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of the issues for which we received comments by parties:

### **General Issues**

**Comment 1: Whether to Eliminate Zeroing from the Margin Calculation Constraints**

**Comment 2: Product-Matching**

**Comment 3: Fraud Allegations and the Reliability of Respondents' Submissions**

### **Ehwa-Specific Issues**

**Comment 4: Treatment of Indirect Selling Expenses**

**Comment 5: Treatment of U.S. Repacking Expenses**

### **Shinhan-Specific Issues**

**Comment 6: Diamond Raw Material Consumption**

**Comment 7: Clerical Error in Treatment of U.S. Repacking and Calculation of CEP Profit**



## BACKGROUND

On December 6, 2011, the Department of Commerce (“Department”) published the preliminary results of the administrative review of the antidumping duty order on diamond sawblades and parts thereof (“diamond sawblades”) from the Republic of Korea (“Korea”).<sup>1</sup> The period of review (“POR”) is January 23, 2009, through October 31, 2010. This review covers imports of diamond sawblades from three producers/exporters: Shinhan Diamond Industrial Co., Ltd. and its affiliate SH Trading Inc. (collectively, “Shinhan”); Ehwa Diamond Industrial Co., Ltd. (“Ehwa”); and Hyosung Diamond Industrial Co., Ltd., Western Diamond Tools Inc., and Hyosung D&P Co., Ltd. (collectively, “Hyosung”). On January 5, 2012, Shinhan and Ehwa submitted case briefs.<sup>2</sup> No rebuttal briefs were submitted. No hearing was requested.

On April 5, 2012, the petitioner, the Diamond Sawblades Manufacturers Coalition, filed an allegation that Ehwa, Shinhan, Hyosung, and Ehwa’s and Shinhan’s Chinese subsidiaries (Weihai Xiangguang Mechanical Industrial Co., Ltd. (“Weihai”) and Qingdao Shinhan Diamond Industrial Co., Ltd. (“Qingdao Shinhan”), respectively) sold diamond sawblades into the United States bearing false country of origin designations. On April 4, 2012, the Department rejected the petitioner’s March 29, 2012 submission due to bracketing deficiencies, but accepted the petitioner’s amended submission dated April 5, 2012, in which the petitioner requested that the Department take information related to this allegation into consideration in both the first and second administrative reviews.

On June 4, 2012, the Department deferred the final results of both the Korea and the People’s Republic of China (“PRC”) reviews in order to address the petitioner’s fraud allegations.<sup>3</sup> Between October 8, 2012, and November 2, 2012, we conducted verifications of Ehwa, Shinhan, Weihai, and Qingdao Shinhan, and met with the Korean Customs Service (“KCS”) concerning the petitioner’s fraud allegations. On December 10, 2012, we issued the cost verification reports for Ehwa and Shinhan. On December 21, 2012, we issued the KCS meeting reports and sales verification reports for Ehwa, Shinhan, Weihai, and Qingdao Shinhan. On November 15, 2012, we requested entry documentation from the U.S. Customs and Border Protection (“CBP”) in order to further confirm the accuracy of exhibits collected during Ehwa’s and Shinhan’s sales and cost verifications. On January 8, 2013, we issued the post-preliminary analysis memorandum in which, based on the verification reports and the KCS meeting report, we preliminarily found that the respondents’ sales and cost data are reliable and not affected by the circumstances that were the bases of the petitioner’s fraud allegations in this administrative review.<sup>4</sup> On January 8, 2013, we also issued a revised tentative schedule for the completion of

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<sup>1</sup> See *Diamond Sawblades and Parts Thereof From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 76128, (December 6, 2011) (“*Preliminary Results*”).

<sup>2</sup> See letter from Shinhan titled, “Diamond Sawblades and Parts Thereof from Korea; 1<sup>st</sup> Administrative Review,” and letter from Ehwa titled, “Diamond Sawblades and Parts Thereof from the Republic of Korea: Case Brief,” dated January 5, 2012.

<sup>3</sup> See Department Memorandum, “Diamond Sawblades and Parts Thereof from the Republic of Korea and the People’s Republic of China: Deferral of the Final Results of the First Antidumping Duty Administrative Reviews,” dated June 4, 2012.

<sup>4</sup> See Department Memorandum, “2009/2010 Review of the Antidumping Duty Orders on Diamond Sawblades and Parts Thereof from the Republic of Korea and the People’s Republic of China: Post-Preliminary Analysis,” dated January 8, 2013 (“*Post-Preliminary Analysis*”).

this review and the companion Chinese review, in which we set February 8, 2013, as the intended due date for the final results of this review.<sup>5</sup>

On January 15, 2013, Shinhan submitted a case brief addressing issues raised in our post-preliminary analysis and the verifications. No other party commented on our post-preliminary analysis.

## **SCOPE OF THE ORDER**

The products covered by the order are all finished circular sawblades, whether slotted or not, with a working part that is comprised of a diamond segment or segments, and parts thereof, regardless of specification or size, except as specifically excluded below. Within the scope of the order are semifinished diamond sawblades, including diamond sawblade cores and diamond sawblade segments. Diamond sawblade cores are circular steel plates, whether or not attached to non-steel plates, with slots. Diamond sawblade cores are manufactured principally, but not exclusively, from alloy steel. A diamond sawblade segment consists of a mixture of diamonds (whether natural or synthetic, and regardless of the quantity of diamonds) and metal powders (including, but not limited to, iron, cobalt, nickel, tungsten carbide) that are formed together into a solid shape (from generally, but not limited to, a heating and pressing process).

Sawblades with diamonds directly attached to the core with a resin or electroplated bond, which thereby do not contain a diamond segment, are not included within the scope of this order. Diamond sawblades and/or sawblade cores with a thickness of less than 0.025 inches, or with a thickness greater than 1.1 inches, are excluded from the scope of these orders. Circular steel plates that have a cutting edge of non-diamond material, such as external teeth that protrude from the outer diameter of the plate, whether or not finished, are excluded from the scope of the order. Diamond sawblade cores with a Rockwell C hardness of less than 25 are excluded from the scope of the order. Diamond sawblades and/or diamond segment(s) with diamonds that predominantly have a mesh size number greater than 240 (such as 250 or 260) are excluded from the scope of the order.

Merchandise subject to the order is typically imported under heading 8202.39.00.00 of the Harmonized Tariff Schedule of the United States (“HTSUS”). When packaged together as a set for retail sale with an item that is separately classified under headings 8202 to 8205 of the HTSUS, diamond sawblades or parts thereof may be imported under heading 8206.00.00.00 of the HTSUS. On October 11, 2011, the Department added HTSUS 6804.21.00.00 to the scope description pursuant to a request by CBP.

The tariff classification is provided for convenience and customs purposes; however, the written description of the scope of the order is dispositive.

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<sup>5</sup> See Department Memorandum, “Revised Schedule for the Deferred Final Results of Administrative Reviews,” dated January 8, 2013.

## CHANGES SINCE THE PRELIMINARY RESULTS

Based on our analysis of the comments received, we have modified the margin program to ensure that the product matching methodology restricts matches on the basis of physical form. *See* Comment 2, below. We also made changes specific to Ehwa. *See* Comment 4, below. Further, as a result of our verifications, we recalculated the costs for certain control numbers and added sales to Ehwa's U.S. sales database. For changes specific to Shinhan, and for further explanation of how the changes relating to Shinhan and Ehwa were applied in the calculation, *see* Department memoranda, "Final Results Calculation for Shinhan Diamond Industrial Co., Ltd.," ("Shinhan Final Calculation Memorandum") and "Final Results Calculation for Ehwa Diamond Industrial Co., Ltd.," ("Ehwa Final Calculation Memorandum"), dated February 8, 2013.

Consistent with the *Preliminary Results*, we determine that Hyosung's failure to provide requested information necessary to calculate accurate dumping margins warrants the continued use of facts otherwise available with an adverse inference.<sup>6</sup> Consequent to the changes from the *Preliminary Results*, the final margin for Hyosung is 120.90 percent. For further discussion, *see* Department Memorandum, "Final Adverse Facts Available Rate for Hyosung," dated February 8, 2013 ("Hyosung AFA Memorandum").

## DISCUSSION OF THE ISSUES

### General Issues

#### **Comment 1: Whether to Eliminate Zeroing from the Margin Calculation Constraints**

##### **Affirmative Comments**

Ehwa and Shinhan disagree with the Department's exclusion of negative dumping margins from its calculations ("zeroing") for the *Preliminary Results* and contend that, for the final results, the Department should allow negative model-specific margins to be included in the aggregate dumping margin calculation.

Shinhan notes that, in response to World Trade Organization ("WTO") decisions, the Department has finalized its decision to abandon its zeroing methodology in investigations where the average-to-average comparison methodology is employed.<sup>7</sup> Despite having adopted this methodology in investigations, Ehwa and Shinhan contend that the Department's continued use of zeroing in administrative reviews had been found to be an inconsistent interpretation of the statute, and is not in agreement with the WTO Antidumping Agreement.<sup>8</sup> Ehwa and Shinhan

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<sup>6</sup> On April 29, 2012, Hyosung formally withdrew its participation in the administrative review. *See* letter from Hyosung, "Diamond Sawblades and Parts Thereof from the Republic of Korea: Withdrawal from Participation by Hyosung D&P Co., Ltd.," dated April 29, 2012.

<sup>7</sup> *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 FR 77722 (December 27, 2006) ("Final Modification").

<sup>8</sup> *See* 19 U.S.C. 1677(35). *See also, e.g., United States—Continued Existence and Application of Zeroing Methodology*, Report of the Appellate Body, WT/DS350/AB/R (February 4, 2009); *United States—Final Antidumping Measures on Stainless Steel from Mexico*, Report of the Appellate Body, WT/DS344/AB/R (April 30,

note that in *Dongbu v. United States* the Federal Circuit acknowledged the ambiguity of 19 U.S.C. 1677(35) in terms of its applicability to both investigations and administrative reviews. However, Shinhan argues that, despite the ambiguity of the statute, the Federal Circuit has also recognized that it is the Department's burden to resolve the gap in the statute and that it "must provide an explanation for why the statutory language supports its inconsistent interpretation."<sup>9</sup> Further, Ehwa and Shinhan assert that, similar to the administrative review underlying the decision in *Dongbu v. United States*, the application of zeroing in the instant administrative review is in direct contrast to the Department's interpretation of 19 U.S.C. 1677(35) in the investigation.<sup>10</sup> Because the Department's interpretations of the same statute in the same proceeding are in opposition, Shinhan and Ehwa argue that the Department must discontinue its use of zeroing for these final results.

Furthermore, Shinhan asserts that the Department has expressed its intention to discontinue the use of zeroing in administrative reviews.<sup>11</sup> Because the Department has recognized its obligation to change its zeroing practice in administrative reviews, issued its proposed regulations, and accepted comments on these regulations, Shinhan contends the Department should implement its *Zeroing Proposal* immediately by discontinuing its use of zeroing in the instant review.

## Department's Position

We have not changed our calculation of the weighted-average dumping margin, as suggested by the respondents, in these final results.

Section 771(35)(A) of the Tariff Act of 1930, as amended ("Act") defines "dumping margin" as the "amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise" (emphasis added). The definition of "dumping margin" calls for a comparison of normal value ("NV") and export price ("EP") or constructed export price ("CEP"). Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act and 19 C.F.R. 351.414 provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These

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2008); *United States- Measures Relating to Zeroing and Sunset Reviews*, Report of the Appellate Body, WT/DS322/AB/R (January 9, 2007); *United States- Laws, Regulations, and Methodology for Calculating Dumping Margins*, Report of the Appellate body, WT/DS294/AB/R (April 18, 2006); *see also United States – Antidumping Measures on Certain Shrimp from Vietnam*, Report of the Panel, WT/DS404/R (July 11, 2011); *United States- Use of Zeroing in Antidumping Measures Involving Products from Korea*, Report of the Panel, WT/DS402/R (January 18, 2011); *United States- Antidumping Measures on Polyethylene Retail Carrier Bas from Thailand*, Report of the Panel, WT/DS383/R (January 22, 2010); *Dongbu Steel Co. v. United States*, 635 F.3d. 1363, 1371-73 (Fed. Cir. 2011) ("*Dongbu v United States*"); and *JTECT Corp. v. United States*, 642 F.3d. 1378 (Fed. Cir. 2011).

<sup>9</sup> *See Dongbu v. United States*.

<sup>10</sup> The Department did not employ its zeroing practice in its final fair value determination of this proceeding. *See Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocation of the Antidumping Duty Order on Diamond Sawblades and Parts Thereof From the Republic of Korea*, 76 FR 66892 (October 28, 2011).

<sup>11</sup> *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings*, 75 FR 81533 (December 28, 2010) ("*Zeroing Proposal*").

comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs (or CEPs) have been averaged together (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 percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

The issue of “zeroing” versus “offsetting” involves how certain results of comparisons are treated in the aggregation of the numerator for the “weighted average dumping margin” and relates back to the ambiguity in the word “exceeds” as used in the definition of “dumping margin” in section 771(35)(A). 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 comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the “weighted average dumping margin” to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

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

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

The difference between “zeroing” and “offsetting” reflects the ambiguity the Federal Circuit has found in the word “exceeds” as used in section 771(35)(A) of the Act.<sup>12</sup> The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.<sup>13</sup> 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 Federal Circuit and other courts squarely addressed the reasonableness of the Department’s zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.<sup>14</sup> In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: “Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce’s interpretation is reasonable and is in accordance with law.”<sup>15</sup> The Federal Circuit 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 so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court has required the Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.<sup>16</sup>

In 2005, a panel of the WTO Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.<sup>17</sup> The initial WTO Dispute Settlement Body Panel Report was limited to the

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<sup>12</sup> *See Timken Co. v. United States*, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (“*Timken*”).

<sup>13</sup> *See PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (“*PAM*”) (“{The} gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce’s methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.”); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (CIT 1996) (“*Bowe Passat*”) (“The statute is silent on the question of zeroing negative margins.”); *Serampore Indus. Pvt. Ltd. v. U.S. Dep’t of Commerce*, 675 F. Supp. 1354, 1360 (CIT 1987) (“*Serampore*”) (“A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value...Commerce may treat sales to the United States market made at or above prices charged in the exporter’s home market as having a zero percent dumping margin.”).

<sup>14</sup> *See, e.g., Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (“*NSK*”); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (“*Corus II*”); *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (“*Corus I*”); *Timken*, 354 F.3d at 1341-45; *PAM*, 265 F. Supp. 2d at 1370 (“Commerce’s zeroing methodology in its calculation of dumping margins is grounded in long-standing practice.”); *Bowe Passat*, 926 F. Supp. at 1149-50; *Serampore*, 675 F. Supp. at 1360-61.

<sup>15</sup> *Serampore*, 675 F. Supp. at 1361 (citing *Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value*, 51 FR 9089, 9092 (March 17, 1986)); *see also Timken*, 354 F.3d at 1343; *PAM*, 265 F. Supp. 2d at 1371.

<sup>16</sup> *See, e.g., Timken*, 354 F.3d at 1343; *Corus I*, 395 F.3d at 1343; *Corus II*, 502 F.3d at 1370, 1375; and *NSK*.

<sup>17</sup> *See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R (Oct. 31, 2005) (“*EC-Zeroing Panel*”).

Department's use of zeroing in average-to-average comparisons in antidumping duty 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 Uruguay Round Agreements Act ("URAA") (19 U.S.C. § 3533(f), (g)) ("Section 123").<sup>18</sup> Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities' arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements. *See EC-Zeroing Panel* at 7.284, 7.291.

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the Federal Circuit recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.<sup>19</sup> Moreover, in *Corus I*, the Federal Circuit acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations. *See Corus I*, 395 F.3d at 1347. In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the Federal Circuit found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations. *See Final Modification*. 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 antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.<sup>20</sup> *See id.*, 71 FR at 77724.

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<sup>18</sup> *See Final Modification*; and *Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification*, 72 FR 3783 (Jun. 26, 2007) (collectively, *Final Modification for Investigations*).

<sup>19</sup> *See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States*, 603 F.3d 928, 934 (Fed. Cir. 2010).

<sup>20</sup> On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012). ("*Final Modification for Reviews*"). The *Final Modification for Reviews* makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the *Final Modification for Reviews* does not apply here.

The Federal Circuit subsequently upheld the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews.<sup>21</sup> In upholding the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations. *Id.*, at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping). The Federal Circuit’s reasoning in upholding the Department’s decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department’s limited decision to cease zeroing only with respect to one comparison type. *Id.*, at 1361-63. The Federal Circuit acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist. *See 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 Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing. *See U.S. Steel Corp.*, 621 F.3d at 1363. In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that “[b]y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist.” *Id.* (emphasis added).

We disagree with the respondents that the Federal Circuit’s decisions in *Dongbu v United States* and *JTEKT Corporation v. US*, 642 F.3d (Fed.Cir. 2011) (“*JTEKT*”), require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in *Dongbu v United States* and *JTEKT* did not overturn prior Federal Circuit decisions affirming zeroing in administrative reviews, including *SKF*, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department’s determination to no longer use zeroing in certain investigations. *See SKF v. United States*, 630 F.3d 1365 (Fed. Cir. 2011) (“*SKF*”). Unlike the determinations examined in *Dongbu v United States* and *JTEKT*, the Department, in these final results, provides additional explanation for its changed interpretation of the statute subsequent to the *Final Modification for Investigations* – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in *Dongbu v United States*, *JTEKT*, *U.S. Steel*, and *SKF*.

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<sup>21</sup> *See United States Steel Corporation v United States*, 621 F.3d 1351, 1355 n.2, 1362-63 (Fed. Cir. 2010) (“*U.S. Steel Corp.*”).

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,<sup>22</sup> the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate 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.

The Department's *Final Modification for Investigations* to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affirmed by the Federal Circuit in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act.<sup>23</sup> 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.<sup>24</sup> Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain 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 nor the *Charming Betsy* doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of Commerce's legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F. 2d 660, 665 (Fed. Cir. 1992). These reasons alone sufficiently

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<sup>22</sup> The *Final Modification for Reviews* adopts this comparison method with offsetting as the default method for administrative reviews, however, as explained in footnote 14 this modification is not applicable to these final results.

<sup>23</sup> See, *e.g.*, *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1382 (Fed. Cir. 2008); *NSK*, 510 F.3d at 1379-1380; *Corus II*, 502 F.3d at 1372-1375; *Timken*, 354 F.3d at 1343.

<sup>24</sup> According to *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” The principle emanating from the quoted passage, known as the *Charming Betsy* doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

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

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, *see, e.g.*, section 777A(d)(1)(A)(i) of the Act, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average EP or CEP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product. In calculating the average EP or CEP, the Department averages all 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 methodology, 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 groups 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 comparison methodology, which permits EPs above normal value to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, *see, e.g.*, section 777A(d)(2) of the Act, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each

individual sale – to calculate the weighted-average dumping margin for the POR. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.<sup>25</sup> Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison 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 EPs 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 comparison methodology.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. Accordingly, the Department’s interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

Regarding other WTO reports cited by the respondents finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, the Federal Circuit has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the URAA. *See Corus I*, 395 F.3d at 1347-49; accord *Corus II*, 502 F.3d at 1375; and *NSK*, 510 F.3d 1375. As is clear from

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<sup>25</sup> 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.

the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department's discretion in applying the statute. *See* 19 USC 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, in the event that any of the U.S. sales transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

## **Comment 2: Product-Matching**

Ehwa asserts that the preliminary margin program does not require identical physical forms when matching U.S. sales to home market sales of "similar" merchandise. Ehwa asserts that this is inconsistent with the Department's stated intent to allow product matching only between products with the same physical forms.<sup>26</sup>

### **Department's Position**

We agree with Ehwa that we intended to limit product matches on the basis of the first product characteristic, "Physical Form." *See* Model Match Comments at "Issue 1: Similar Product Matches." Accordingly, we have revised the margin program for Shinhan and Ehwa to restrict both identical and similar product matches within the first product characteristic, "Physical Form." *See* Shinhan Final Calculation Memorandum at 2, and Ehwa Final Calculation Memorandum at 2.

## **Comment 3: Fraud Allegations and the Reliability of Respondents' Submissions**

Shinhan argues that the conclusions of the Department's Post-Preliminary Analysis and evidence presented in the verification reports confirm the reliability and accuracy of Shinhan's home market and U.S. sales databases, as well as the accuracy of Shinhan's responses to the Department's supplemental questionnaires addressing Petitioner's allegations of fraud. Shinhan states that the Department's meeting with officials of the KCS validates the accuracy of the information provided by Shinhan.

### **Department's Position**

We agree with Shinhan that the Department's extensive investigation of the fraud allegations uncovered no evidence that impugns the reliability and accuracy of the Shinhan sales and cost data submitted in the instant review. Accordingly, the Department finds no basis relating to Petitioner's fraud allegations to change the preliminary margin. The Department's changes in

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<sup>26</sup> *See* Memorandum from Christopher Siepmann, International Trade Compliance Analyst, AD/CVD Operations, Office 1, to Susan Kuhbach, Office Director, AD/CVD Operations, Office 1, titled, "Summary of Comments from Interested Parties on Model Match Characteristics," dated April 4, 2011 ("Model Match Comments").

the final results calculations are limited to those described in Comment 2, above, and Comment 4, below, and discussed in the Shinhan Final Calculation Memorandum, Ehwa Final Calculation Memorandum, and Hyosung AFA Memorandum.

### **Ehwa-Specific Issues**

#### **Comment 4: Treatment of Indirect Selling Expenses**

Ehwa argues that the Department's margin program inappropriately applied a currency conversion to Ehwa's foreign indirect selling expenses, which it reported in U.S. dollars.

#### **Department's Position**

We agree with Ehwa that this expense was reported in U.S. dollars. Accordingly, we have removed the currency conversion for this expense in Ehwa's margin program. *See* Ehwa Final Calculation Memorandum at 3.

#### **Comment 5: Treatment of U.S. Repacking Expenses**

Ehwa argues that it is the Department's practice to exclude U.S. movement expenses from the calculation of CEP profit. In support, Ehwa cites the Department's Policy Bulletin 97.1. Ehwa also argues that, consistent with the underlying less than fair value ("LTFV") investigation, the Department should classify Ehwa's U.S. repacking expenses as U.S. movement expenses with the result that they would also be excluded from the calculation of CEP profit.<sup>27</sup>

#### **Department's Position**

While the Department agrees that Policy Bulletin 97.1 explains that the Department's practice is to exclude movement expenses from CEP selling expenses and CEP profit, we disagree with Ehwa that its U.S. repacking should be classified as a movement expense rather than as a direct selling expense. As an initial matter, Policy Bulletin 97.1 does not state that repacking should be treated as a movement expense or that it should be excluded from the CEP profit calculation.

In accordance with section 772(d)(1)(B) of the Act, the Department normally classifies repacking as a direct selling expense when these expenses "result from, and bear a direct relationship to, the sale."<sup>28</sup> In the LTFV investigation, we did treat Ehwa's repacking as movement expenses. However, it is well established and upheld practice that the Department

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<sup>27</sup> *See Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 FR 29310 (May 22, 2006) ("*Final Determination*") and accompanying Issues and Decision Memorandum at Comment 4, and Policy Bulletin 97.1, "Calculation of Profit for Constructed Export Price Transactions," dated September 4, 1997.

<sup>28</sup> *See, e.g., Certain Orange Juice From Brazil: Preliminary Results of Antidumping Duty Administrative Review and Preliminary No Shipment Determination*, 77 FR 21724 (April 11, 2012), unchanged in *Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 77 FR 63291 (October 16, 2012).

must base its decisions on the record of the administrative proceeding before it in each review.<sup>29</sup> Here, the record of the instant proceeding does not indicate that the Department should deviate from its normal practice of classifying U.S. repacking as a direct selling expense. In its questionnaire response, Ehwa noted that, with respect to repacking, “General Tool repacks some of the sawblades before shipping into {sic} individual consumer packages,” and that, “In addition, General Tool also repacks some sawblades in shipping materials prior to shipment to the customer.”<sup>30</sup> Thus, Ehwa’s repacking is not necessary to transporting the subject merchandise to the United States, and is, thus, not a movement expense as conceived by section 772(c)(2)(A) of the Act.

### **Shinhan-Specific Issues**

#### **Comment 6: Diamond Raw Material Consumption**

The Department noted in the cost verification report that for a particular production run of a product, Shinhan used less diamond input than the diamond quantity reported in the physical characteristic of the CONNUM.<sup>31</sup> It was unclear to the Department how the actual diamond input quantity for the one production run could be less than the reported diamond content for that product. The Department did note however that the total diamond input for all the production runs during the month for this product was more than the reported quantity.

According to Shinhan, the Department’s observation did not take into account possible surplus diamond input. Shinhan explains that, during the POR, it was transitioning the production of this product to a new machine. During the transition period, excess diamond materials were loaded in the machine. Shinhan continues that these excess diamonds which were loaded in the machine were used in subsequent production runs, which explains why the one production run noted in the cost verification report shows low direct diamond consumption compared to the average for the month.

Petitioner did not submit any comments.

#### **Department’s Position**

We agree with Shinhan’s explanation that it is plausible for it to have used excess diamonds that were loaded into the machine for the production run in question because the total diamond input for all the production runs of that product during the month was consistent with the yielded material usage for that CONNUM.

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<sup>29</sup> See, e.g., *Stainless Steel Sheet and Strip in Coils from Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 7519 (February 13, 2006) at Comment 4 (“each administrative review of the order represents a separate administrative proceeding and stands on its own.”); *Handong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (CIT 2005) (“As Commerce points out ‘each administrative review is a separate segment of proceedings with its own unique facts. Indeed, if the facts remained the same from period to period, there would be no need for administrative reviews.’”).

<sup>30</sup> See Ehwa’s June 20, 2011 questionnaire response at C-37.

<sup>31</sup> See Department Memorandum, “Verification of the Cost Response of Shinhan Diamond Industrial Co., Ltd. in the First Antidumping Duty Administrative Review of Diamond Sawblades and Parts Thereof from the Republic of Korea,” dated December 10, 2012, at 1 and 7.

## **Comment 7: Clerical Error in Treatment of U.S. Repacking and Calculation of CEP Profit**

In its January 15, 2013 comments, Shinhan argues that the Department made a “minor clerical error” when it allocated CEP profit to U.S. repacking expenses “contrary to the Department’s standard practice.” Shinhan asserts that the Department is obliged to correct this alleged error in the final results pursuant to *Timken U.S. Corp v. United States*, 434 F.3d 1345, 1353 (Fed Cir.). Shinhan contends that, consistent with the underlying LTFV investigation, the Department should classify its U.S. repacking expenses as U.S. movement expenses with the result that they would be excluded from the calculation of CEP profit.<sup>32</sup> Shinhan suggests that in making this change, the Department would simply be fulfilling its obligation to correct the alleged clerical error.

### **Department’s Position**

The Department’s treatment of repacking expenses as a direct selling expense is not a clerical error, but rather, based on our practice. *See* Department Position in Comment 5, above. Shinhan’s underlying methodological arguments regarding the correctness of classifying the particular U.S. repacking expenses as direct selling expenses are untimely and should have been raised in the original case brief that was due on January 5, 2012.

### **RECOMMENDATION:**

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

AGREE\_\_\_\_\_ DISAGREE\_\_\_\_\_

\_\_\_\_\_  
Paul Piquado  
Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date

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<sup>32</sup> *See Final Determination* and accompanying Issues and Decision Memorandum at Comment 4, and Policy Bulletin 97.1.