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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Gary Taverman *ST*
Senior Advisor
for Antidumping and Countervailing Duty Operations

RE: Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Issues and Decision Memorandum for the Final Results

Summary

We have analyzed the case and rebuttal briefs of petitioner, United States Steel Corporation (U.S. Steel), domestic producer Nucor Corporation (Nucor), and respondents, Dongbu Steel Co., Ltd. (Dongbu), Hyundai HYSCO (HYSCO), LG Hausys, Ltd. (Hausys), and Union Steel Manufacturing Co., Ltd. (Union), for the final results of the 2010/11 administrative review of the antidumping duty order on corrosion-resistant carbon steel flat products (CORE) from the Republic of Korea (Korea). We also have analyzed the comments and rebuttal comments from HYSCO, Dongbu, Nucor and U.S. Steel on the Department's analysis of the targeted dumping allegation in this review for the final results.

We recommend that you approve the positions provided below in the "Discussion of Comments" section of this Issues and Decision Memorandum.

Background

On September 6, 2012, the Department of Commerce (the Department) published the *Preliminary Results* of the administrative review of CORE from Korea.¹ At that time, the Department did not address the petitioner's targeted dumping allegation.² We invited interested parties to comment on our *Preliminary Results*.³ On October 26, 2012, Dongbu, Hausys, Union, and U.S. Steel submitted case briefs on the Department's *Preliminary Results*.⁴ On November

¹ See *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Preliminary Results of the 18th Antidumping Duty Administrative Review, and Partial Rescission*, 77 FR 54891 (September 6, 2012) (*Preliminary Results*).

² See *id.*

³ See *id.*

⁴ See Dongbu's, Hausys's, Union's and U.S. Steel's comments on the Department's *Preliminary Results*, all dated October 26, 2012.



6, 2012, Dongbu, HYSCO, and U.S. Steel submitted rebuttal briefs on the Department's *Preliminary Results*.⁵

On December 26, 2012, the Department issued a post-preliminary analysis.⁶ At that time, we invited parties to comment on the Department's analysis in addressing the petitioner's targeted dumping allegation in this review.⁷ On January 7, 2013, HYSCO, Dongbu, Nucor, and U.S. Steel submitted comments on the Department's Post-Preliminary Analysis.⁸ On January 17, 2013, HYSCO, Nucor and U.S. Steel submitted rebuttal comments to the Department's Post-Preliminary Analysis.⁹

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⁵ See Dongbu's, HYSCO's and U.S. Steel's rebuttal comments on the Department's *Preliminary Results*, all dated November 6, 2012.

⁶ See the Department's "2010/2011 Review of the Antidumping Duty Orders on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Post-Preliminary Analysis Memorandum," dated December 26, 2012 (Post-Preliminary Analysis").

⁷ See Post-Preliminary Analysis at 4 and 5.

⁸ See HYSCO's, Dongbu's, Nucor's and U.S. Steel's comments on the Department's Post-Preliminary Analysis, all dated January 7, 2013.

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Discussion of Comments

General Issues

Comment 1: Targeted Dumping

A. Application of Alternative Methodology and Targeted Dumping

Dongbu's Case Brief Arguments

- The Department lacks the legal authority to apply the targeted dumping exception under section 777A(d)(1)(A) and (B) of the Tariff Act of 1930, as amended (Act) in administrative reviews.
- In administrative reviews in which the preliminary results were issued after April 16, 2012, the Department has announced that it will apply the average-to-average (A-A) comparison methodology without zeroing.¹⁰
- The Department also announced in its *Final Modification for Reviews* that its adoption of the A-A comparison methodology without zeroing parallels “the WTO-consistent methodology that the Department applies in original investigations.”¹¹
- The Department's A-A comparison methodology without zeroing in administrative reviews also provides that the Department can depart from the A-A comparison methodology if it “determines another method is appropriate”¹² on a case-by-case basis by examining the same criteria used in original investigations, pursuant to section 777A(d)(1)(A) and (B) of the Act.¹³
- The Department's explanation in the Post-Preliminary Analysis for its interpretation of the targeted dumping exception in administrative reviews¹⁴ fails to address the fundamental legal problems with interpreting a statutory provision that Congress

¹⁰ See *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8,101 (February 14, 2012) (*Final Modification for Reviews*) (codified in 19 CFR 351.414(c)(1)).

¹¹ See *id.*

¹² See 19 CFR 351.414(c)(1).

¹³ See *Final Modification for Reviews*.

¹⁴ See Post-Preliminary Analysis at 2: “Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question {of targeted dumping} in the context of administrative reviews, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1)(2012) in administrative reviews is, in fact, analogous to the issue in antidumping investigations. Accordingly, the Department finds the analysis that has been used in antidumping investigations may be instructive for purposes of examining whether to apply the average to transaction (A-T) method in this administrative review.”

specifically limited to investigations as also applying in administrative reviews.

- It is a well-established canon of statutory construction that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹⁵ It is also a “familiar principle of statutory construction” that “a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”¹⁶
- In the instant case, Congress included a specific exception for use of the A-T comparison methodology in investigations but did not include a similar exception from the provision dealing with administrative reviews. Specifically, subsection 777A(a)(b) and (c) of the Act provide that they apply to both investigations and administrative reviews. In contrast, subsection (d) makes plain that it does not apply to both investigations and administrative reviews in that subpart (d)(1) applies to only investigations, and (d)(2) applies to only administrative reviews. Congress thus specifically provided authority to apply the A-T comparison methodology exception in investigations but omitted that authority from the provision of the statute that deals with administrative reviews only.
- The Department must interpret the statute in accordance with Congress’ clear intent to omit the A-T comparison methodology exception from the paragraph on administrative reviews. “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent.”¹⁷
- Absent legislative authority to apply the targeted dumping exception in administrative reviews, the Department “has no power to act . . . unless and until Congress confers power upon it.”¹⁸ The Department’s change in policy and regulations as announced in the *Final Modification for Reviews* does not provide it with legal authority to apply the targeted dumping exception to the instant administrative review. That exception is expressly limited to investigations, not administrative reviews such as here.

HYSCO’s Case Brief Arguments

- The antidumping statute does not permit the use of the targeted dumping methodology in administrative reviews, but is limited to original investigations, and the Department may not apply the statutory language intended for investigations to administrative reviews.

U.S. Steel’s Rebuttal Arguments

- The statute contains an explicit exception for use of the A-T comparison methodology in investigations but does not do so for administrative reviews, because the statute authorizes

¹⁵ See *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009); *Keene v. United States*, 508 U.S. 200 (1993) (holding that interpreters have a duty to avoid reading phrases into statutes where Congress made a disparate inclusion or exclusion); *Bates v. United States*, 522 U.S. 23 (1997) (reiterating that Congress is presumed to act intentionally when including or excluding statutory language).

¹⁶ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006).

¹⁷ See *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

¹⁸ See *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

the Department to use the A-T comparison methodology regardless of whether there is or is not evidence of targeted dumping.¹⁹

- The Department has consistently dismissed similar challenges to its statutory authority to use the targeted dumping analysis in administrative reviews.
- Reliance on *Dongbu Steel* and *JTEKT* is misplaced because those cases do not address administrative reviews involving targeted dumping.²⁰ Rather, both *Dongbu Steel* and *JTEKT* acknowledge that the Department has discretion to employ the methodology without offsets so long as it provides a reasonable explanation for its different interpretations of the statute.

Nucor's Rebuttal Arguments

- The statute is silent on the matter of whether and under what circumstances the Department may apply a targeted dumping analysis in reviews.
- The statute provides for three types of comparison methods in investigation, and specifies that one of them shall be used in investigations where targeted dumping occurs, but does not list any particular comparison methods to be employed in reviews, or indicate when they ought to be employed.

B. Withdrawal of Targeted Dumping Regulation

Dongbu's Case Brief Arguments

- The Department violated the Administrative Procedure Act (APA) in withdrawing its targeted dumping regulation and in making substantive revisions to the *Nails*²¹ Test without notice and comment.
- The Department's targeted dumping regulation had provided that it "will use, among other things, standard statistical techniques in determining whether there is a pattern of prices that differ significantly" and that even in cases where it found targeted dumping it "will limit the application of the A-T method to those sales that constitute targeted dumping ..."²²
- The Department withdrew its targeted dumping regulation in 2008,²³ without notice and comment, on the grounds "good cause" existed to waive those requirements,²⁴ which was a violation of the APA. The APA requires that government agencies publish "{g}eneral notice of proposed rule-making" in the *Federal Register*, and give interested persons an opportunity to participate in the rule making through submission

¹⁹ See section 777A(d)(2) of the Act.

²⁰ See *Dongbu Steel Co., Ltd v. United States*, 635 F.3d 1363, 1373 (Fed. Cir. 2011) (*Dongbu Steel*); *JTEKT Corp. v. United States*, 642 F.3d 1378, 1385 (Fed. Cir. 2011) (*JTEKT*).

²¹ See *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 (Nails)*, 73 FR 33977 (June 16, 2008).

²² See 19 CFR 351.414(f)(1)(ii) and (2).

²³ See *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74,930 (December 10, 2008) (*Withdrawal Notice 2008*).

²⁴ See *id.*

of written data, views, or arguments before publishing rules.²⁵

- These notice and comment requirements must be followed unless waived “when the agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” And if a waiver applies, the agency must “incorporate the finding and a brief statement of reasons therefore in the rules issued.”²⁶
- The Department’s explanation for not following the required notice and comment procedures was that “good cause” existed under 5 U.S.C. § 553(b)(B) because the notice and comment requirement “is impracticable and contrary to the public interest.”²⁷ The Department concluded that immediate revocation of its regulation was necessary because it “would act to deny relief to domestic industries suffering material injury from unfairly traded imports.”²⁸
- The Department’s explanation, without any examples or evidence substantiating it, did not constitute valid “good cause” under the APA.²⁹ The public interest did not justify the Department’s waiver of notice and comment under the APA. “Public interest” in the APA refers to the threat of anticipatory evasion by the regulated parties once those parties know they will soon face new restrictions.³⁰ No such threat was present here.
- The Department in the final results must follow its targeted dumping regulation by applying standard statistical techniques and by only applying the A-T comparison method to the targeted sales, or find that it has not made a valid determination of targeted dumping.

U.S. Steel’s Rebuttal Arguments

- Dongbu was given sufficient notice of the Department’s intentions with respect to applying the *Nails* Test in this proceeding, and given sufficient opportunity to comment throughout. Further, the APA’s notice and comment requirements do not apply to interpretative rules such as the *Nails* Test.
- The Department has discretion to refine and change its methodology for measuring targeted dumping on a case-by-case basis, without following the APA’s notice-and-comment procedure.

²⁵ See 5 U.S.C. § 553(b)(3) and § 553(c).

²⁶ See *id.* at § 551(5); *Tunik v. Merit Sys. Protection Bd.*, 407 F.3d 1326, 1342 (Fed. Cir. 2005).

²⁷ The Department stated that because it promulgated the targeted dumping regulations without the benefit of experience it “may have established thresholds or other criteria that have prevented the use of the comparison methodology to unmask dumping” and “may have established an impractical deadline for submitting such allegations.” See *Withdrawal Notice 2008*.

²⁸ See *id.*

²⁹ The Federal Circuit has made clear that all exceptions under the APA, including the good cause exception, are “narrowly construed and only reluctantly countenanced.” See *Tunik*, 407 F.3d at 1344.

³⁰ See, e.g., U.S. Justice Department, Attorney General’s Manual on the Administrative Procedures Act (1947) at 30; *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974) (“Had advance notice issued, it is apparent that there would have ensued a massive rush to raise prices and conduct ‘actual transactions’-or avoid them- before the freeze deadline.”).

- The Department did not violate the APA by withdrawing its targeted dumping regulation in 2008, and the Department correctly determined that “good cause” existed for the waiver of the notice-and-comment requirements.
- The Department has been consistent in dismissing challenges to compliance with the APA.

Nucor’s Rebuttal Arguments

- The Department is not constrained by withdrawn regulations.
- Good cause existed to waive the notice and comment period, and that the Department had previously published a notice asking for comments on methodologies applicable to targeted dumping allegations.
- The Department’s refinement of the *Nails* Test through individual cases is not in violation of the APA.
- The *Nails* Test is not a rule, and there are no current rules or regulations regarding targeted dumping, rather, the Department withdrew its regulations because it realized that targeted dumping was an important and emerging area that would require careful consideration and the development of new methodologies.

C. Department’s Targeted Dumping Analysis

Dongbu’s Case Brief Arguments

- The Department’s targeted dumping analysis is arbitrary and unreasonable because it contains certain mathematical deficiencies and arbitrary features.
- Chief amongst these is the fact that the Department is applying an alternative comparison methodology to all of Dongbu’s sales despite the fact that only an insignificant percentage of Dongbu’s total U.S. sales are targeted and dumped. It is unreasonable to apply such a remedy when the difference between Dongbu’s weighted-average dumping margin being below *de minimis* and above *de minimis* is based on such an inconsequential amount of sales.
- First, the test should include a check to determine whether sales prices are normally distributed. However, the Department’s standard deviation test, used to identify whether there is a “pattern” of differing export prices is arbitrary and lacks statistical rigor. The 33 percent threshold is based on the fact that, in a “normal” database, one standard deviation would capture 68 percent of the data points.³¹ Yet the Department’s analysis does not test whether the database in fact meets the mathematical test for normality. Moreover, the Department is applying this analysis not to the sales prices themselves, but to the *weighted average* of those prices by CONNUM, and only

³¹ See *Encyclopedia of Mathematics Education* 507 (Louise S. Grinstein and Sally I. Lipsey eds., Routledge Falmer 2001). Also, the Department has acknowledged this statistical characteristic of one standard deviation. See *High Pressure Steel Cylinders From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 26739 (May 7, 2012) 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) and accompanying Issues and Decision Memorandum at Comment 3.

for sales of identical merchandise.

- Second, the test fails to adhere to the statutory requirement that it test for patterns in “export prices” because it relies on weight-averaged prices. The statute requires the analysis of individual “export prices” for a targeted dumping finding, where “export price” is defined as “the price at which” the merchandise is sold,³² not the average price. However, the Department conducts its analysis not on the variation in individual prices, but based on the weighted average price for all sales of a CONNUM to the alleged target.³³ By weight averaging prices in this manner, the Department unnecessarily shrinks the results of these two mathematical functions, thereby greatly increasing the chance that outlying sales will be found targeted.³⁴
- Third, it is not clear what the second portion of the *Nails* Test actually measures or why that measurement is meaningful. The Department’s gap test defies logic and is arbitrary, thereby making the overall results of the targeted dumping analysis arbitrary. The stated objective of the gap test is to determine whether the prices “differed significantly.”³⁵ It is not apparent how this gap test attempts to accomplish the stated objective. It is also arbitrary to assign such importance to the gap between the alleged target’s price and the next higher non-targeted price, while disregarding any lower prices.³⁶
- Further, by requiring that five percent of an alleged target’s sales must pass the gap test in order to find targeting practically guarantees that the gap test will result in a finding of targeting in a more-or-less evenly dispersed dataset, because it is random whether that gap will be higher or lower than the weighted average gap of the non-targeted prices. The Department’s methodology also does not establish a pattern of prices which differ significantly from non-targeted prices.
- Fourth, the test unreasonably relies on sales that are targeted, but not dumped. Under the Department’s targeted dumping methodology, sales can be found to be targeted which were not dumped. The Department has not adequately explained how an exporter could be engaged in “targeted dumping” with respect to sales that are not sold

³² See section 772(a) of the Act.

³³ Citing *Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (Oct. 18, 2011) (*Wood Flooring*) and accompanying Issues and Decision Memorandum at Comment 4 (“The Department disagrees with the {Government of the People’s Republic of China} that the statute suggests that individual prices should be used instead of average prices.”).

³⁴ Dongbu argues that it is also perverse that the Department uses average prices given that the entire purpose of the targeted dumping exercise is to ensure that the A-A comparison method does not mask dumping of individual sales transaction prices. It runs counter to that purpose for the Department to begin its targeted dumping analysis by averaging sales transaction prices. By using averages the Department’s test intentionally “masks” actual market price which is contrary to Congressional intent.

³⁵ Dongbu notes the Department’s gap test methodology compares the gap between the alleged target’s U.S. net price and the next higher non-targeted U.S. net price with the weighted average gap between all the non-targeted U.S. net prices (as long as their prices are higher than the alleged target’s price). If the alleged target’s gap is higher, then it passes the gap test.

³⁶ See *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 4. Dongbu argues the Department acknowledges that there could be one or many non-targeted sales that are lower than the allegedly targeted sales price which would simply be disregarded without consequence for purposes of the gap test. Therefore, the Department’s methodology does not establish a pattern of prices which differ significantly from non-targeted prices. Rather, the alleged targeted sale price might be right in line with the other prices, or even higher, and still pass the gap test.

for less than fair value. Although there is some indication in its margin program that Department may be considering the percentage of targeted sales that are at dumped as part of its analysis, there is no indication as to what percentage of targeted sales need be dumped in order to support the use of the A-T comparison method with zeroing.³⁷

- In this case, only a limited universe of Dongbu's sales to the United States that were found to be targeted were dumped while a large percentage of Dongbu's sales that were found targeted were not dumped. The Department has not explained how such a limited universe of dumped sales can support the use of the A-T comparison methodology with zeroing to all Dongbu's sales.
- Fifth, the test fails to measure whether "sufficient sales" exist. The Department stated in its Post-Preliminary Analysis that it was also examining whether the sales that passed the two-part *Nails* Test constituted "sufficient sales."³⁸ It appears from other recent cases that if the volume/value of targeted sales is not "sufficient" then the Department will not apply the A-T comparison methodology with zeroing.³⁹ However, the Department has offered no guidelines or standards for what volume constitutes "sufficient sales."
- The Department has provided no guidance as to what constitutes a "meaningful difference," and whether meaningful difference exists between the weighted-average dumping margin, calculated using the A-A comparison methodology, and the A-T comparison methodology.
- Sixth, the Department has not announced bright-line standards for what constitutes "sufficient sales" to merit the use of the A-T comparison methodology.
- Taken as a whole, the Department's targeted dumping analysis does not achieve its statutorily mandated objective of finding a pattern of export prices which differ significantly. Rather, it has been designed to find targeted dumping in practically any normal dataset. As such, the Department's methodology is arbitrary and must be abandoned or substantially altered in the final results.

HYSCO's Case Brief Arguments

- The Department correctly determined that HYSCO did not engage in targeted dumping, and should continue to apply the A-A comparison methodology, without zeroing, for the final results.

³⁷ See, e.g., 2010-2011 Administrative Review of Polyethylene Terephthalate Film Sheet and Strip from Taiwan: Post-Preliminary Calculations for Shinkong Synthetic Fibers Corporation and its subsidiary Shinkong Materials Technology Co., Ltd., Case No. A-583-837 (December 20, 2012).

³⁸ See Post-Preliminary Analysis at 3.

³⁹ See Polyethylene Terephthalate Film, Sheet and Strip (PET film) from India: Post-Preliminary Analysis and Calculation Memorandum, Case No. A-533-824 (December 20, 2012) at 5.

HYSCO's Rebuttal Comments

- The Department is not prohibited from making adjustments to its targeted dumping methodology in finding that the percentage of sales that passed the *Nails* Test was too small to justify applying the A-T comparison methodology to HYSCO.
- There is no meaningful difference in the margin determined under the A-A and A-T comparison methodologies.

U.S. Steel's Rebuttal Arguments

- The *Nails* Test is neither flawed nor arbitrary.
- The Department is employing the standard deviation as a relative standard against which to measure the differences between the price to the alleged target and to the non-targeted group.
- The *Final Modification for Reviews* was implemented to comply with a World Trade Organization (WTO) decision regarding zeroing.⁴⁰
- The A-T test does not produce results that satisfy the statutory requirement that requires the Department to identify prices that differ significantly across purchasers, regions, or time periods.
- Using weighted-average prices instead of individual prices to test for the requisite price pattern has been settled in previous cases.
- The gap test properly identifies significant differences in prices.
- The Department's application of and rationale supporting the *Nails* Test in antidumping investigations is no different than in the context of administrative reviews, and the Department has acted consistent with congressional intent.
- The CIT has upheld the *Nails* Test.

Nucor's Rebuttal Arguments

- CIT has previously upheld the Department's use of standard deviation in the *Nails* Test.⁴¹
- The Department has consistently used weighted-average export prices because the gap test is performed on a weighted-average basis.
- The gap test quantifies whether a degree of separation between a low targeted price and the next lowest non-targeted prices is sufficient in determining the significant difference in prices with respect to the targeted sales.
- The Department's test appropriately adjusts the margin calculation at the first sign of targeted dumping.
- The gap test is performed on data for which a pattern of consistently lower prices have already been identified, and is methodologically sound because a pattern of consistently lower pricing to the targeted customer has already been established.

⁴⁰ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

⁴¹ See, e.g., *Mid Continent Nail Corporation v. United States*, CIT Slip Op. 10-48 (2010) (*Mid Continent Nail*) at 11-13.

- The Department should not examine sufficient sales or meaningful differences.

U.S. Steel’s Case Brief Arguments

- The Department improperly went beyond the two-step analysis in the *Nails* Test in determining whether HYSCO and Dongbu engaged in targeting, which resulted in an erroneous determination for HYSCO.
- In its Post-Preliminary Analysis, the Department went beyond two-step analysis to determine the percentages of U.S. sales that passed the *Nails* Test and then used those percentages to determine whether there is the requisite price pattern. Based on those percentages, the Department determined whether there is a pattern of prices for U.S. sales of comparable merchandise that differs significantly among certain purchasers, regions, or periods of time. In so doing, the Department did not specify the percentage of targeted U.S. sales that is necessary in order for it to find that there is a “pattern.”
- Since it first announced the *Nails* Test in 2008,⁴² the Department has consistently applied the two-step analysis⁴³ and has never suggested that an additional step beyond the *Nails* Test is necessary or appropriate for purposes of determining whether targeting has occurred.⁴⁴ Its sudden decision to impose such an additional step is arbitrary and not supported by either the Department's practice or the statute.
- Any additional step was considered and flatly rejected by the Department in *Wood Flooring from China*, where a respondent argued that the Department should require that a minimum of 10 percent of the sales quantity *or* value be found to be targeted before a targeted dumping allegation is sustained by the Department. The Department rejected that argument and explained that “establishing a *de minimis* standard would not be appropriate because once the Department finds any instances of targeted dumping the Department has determined that application of the A-T comparison methodology is necessary to fully analyze the extent of the dumping that is taking place.” There is no reason for the Department to impose a standard that it previously found to be inappropriate.
- As the Department stated, “[t]he only limitations the statute places on the application of the A-T method are the satisfaction of the two criteria set forth in the provision.”⁴⁵
- Both of these criteria are met here for HYSCO and Dongbu for targeted dumping.⁴⁶ The two-step *Nails* Test shows that both HYSCO’s and Dongbu’s U.S. sales data have a clear pattern of significant price differences by time period, with Dongbu’s U.S. sales also showing targeting by customer and region, meaning that both respondents

⁴² See Memorandum to David M. Spooner entitled “Post-Preliminary Determination on Targeted Dumping” (April 21, 2008). This case established the two-part “*Nails* Test.”

⁴³ See *Nails* Test and accompanying Issues and Decision Memorandum at Comment 8. See also *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination*, 75 FR 20335 (April 19, 2010) (*OCTG from China*) and accompanying Issues and Decision Memorandum at Comment 2, which states that “[t]he *Nails* Test provides a two-stage analysis to determine whether there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time.” See also section 777A(d)(1)(B)(ii) of the Act.

⁴⁴ See *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 4.

⁴⁵ *Id.*

⁴⁶ See U.S. Steel’s Targeted Dumping Allegation for HYSCO (May 8, 2012); U.S. Steel’s Targeted Dumping Allegation for Dongbu (May 24, 2012).

engaged in targeted dumping requiring the application of the A-T margin calculation methodology.

- For the final results, the Department should revise its targeted dumping analysis and find that both HYSCO and Dongbu engaged in targeted dumping. Consistent with its established practice, the Department should apply the A-T method (without applying offsets for non-dumped sales) to calculate the dumping margins for both respondents.

D. Application of the *Nails* Test

Dongbu's Case Brief Arguments

- The Department has unlawfully applied the A-T comparison methodology to all of Dongbu's sales, including sales that were not found to be targeted.
- The Department issued the two-part *Nails* Test on April 21, 2008.⁴⁷ It subsequently published a notice seeking comments on the *Nails* Test as its proposed methodology,⁴⁸ but the Department has not published any final regulation on targeted dumping. Instead it made multiple substantive changes to the *Nails* Test without separate notice and comment. These changes have a major impact on the rights of interested parties such as Dongbu's in this case.
- One major substantive change was the Department's decision to apply the A-T comparison methodology with zeroing to all of Dongbu's sales and not just to those which passed the *Nails* Test.⁴⁹ Under the Department's two-part *Nails* Test as applied in the original *Nails* investigations, the Department did not apply the A-T comparison methodology to all sales, but only to those sales which passed the *Nails* Test.⁵⁰
- This change in its targeted dumping analysis was substantive. In Dongbu's case, the Post-Preliminary Analysis shows that the application of the A-T comparison methodology with zeroing to all sales, as opposed to just applying this methodology to the sales which passed the *Nails* Test, is the difference between a below *de minimis* weighted-average dumping margin and the above *de minimis* weighted-average dumping margin determined in the Post-Preliminary Analysis. Renewed notice and comment was required under the APA because this change was substantive and was not a "logical outgrowth" of the original rule.⁵¹
- Without providing the required notice and comment on these substantive changes to the *Nails* Test, interested parties, such as Dongbu, are left in a position of not knowing by what standard its pricing behavior will be judged, and not knowing how to conform

⁴⁷ See *Nails* Test.

⁴⁸ See *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 FR 26371 (May 9, 2008).

⁴⁹ See Post-Preliminary Analysis at 4.

⁵⁰ See *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010) (*Carrier Bags from Taiwan*) and accompanying Issues and Decision Memorandum at 4 (stating that in the original *Nails* investigations the Department "limited the application of the A-T methodology solely to targeted sales.").

⁵¹ See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

their pricing behavior to avoid a finding of targeted dumping.

- These are the reasons why Congress requires notice and comment for substantive rules and methodologies that significantly impact the rights of interested parties.⁵² By failing to provide the required notice and comment on these substantive changes to the *Nails Test*, the Department has run afoul of the letter and spirit of the APA.

U.S. Steel's Rebuttal Arguments

- The statute permits the Department to apply the A-T comparison methodology to all of a respondent's sales where targeting is identified. Further, the statute does not provide that the A-T comparison methodology should be applied to only one part of respondent's sales and not another part of respondent's sales. Rather, the statute provides that where a pattern of prices that differ significantly has been identified, then the A-T comparison methodology may be applied to all sales.
- The Statement of Administrative Action (SAA) does not show a clear Congressional intent to apply the A-T comparison methodology only to a portion of respondent's sales. Rather, the Department is permitted to apply the A-T comparison methodology to all of a respondent's sales where targeted dumping is identified in order to ensure that respondents cannot "conceal" their targeting of sales to a particular group by making higher-priced sales to the non-targeted group that offset the dumping margins attributable to the targeted sales.
- The Department has expressly stated that it has abandoned the practice of limiting the application of the A-T comparison methodology to only a subset of sales.

Nucor's Case Brief Arguments

- The Department should continue to apply an A-T comparison methodology using zeroing for Dongbu.
- The Department should correct a clerical error with respect to Dongbu's customer code.

Nucor's Rebuttal Arguments

- The Department has determined that due to the existence of targeting a comparison method other than the A-A method is appropriate.
- The statute allows for the A-T method wherever there is a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions or periods of time.

⁵² See S. Rep. No. 752, 79th Cong., 1st Sess. 7 (1945), *reprinted in* Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong. 2d Sess. 193 (1946) (purpose of notice and comment is "to afford parties affected by administrative {rulemaking} a means of knowing what their rights are and how they may be protected.").

E. Application of Zeroing

Dongbu's Case Brief Arguments

- The Department has unlawfully zeroed out negative comparison results for all sales.
- Congress made clear that the exception for the Department to use the A-T comparison methodology was to capture “targeted dumping” in cases where “there is a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions or periods of time” and the Department “explains why such differences cannot be taken into account” using the A-A or transaction-to-transaction (T-T) comparison methodologies.⁵³
- The Department’s decision to apply the A-T comparison methodology to all sales, targeted and not targeted, is inconsistent with Congressional intent and thus unlawful. The statutory language also indicates that only those transactions that meet both the pattern and significant difference requirements are covered by the exception.
- Even if the Department continues to apply the A-T comparison methodology in the instant review, it cannot lawfully use this as a basis to deny offsets for non-dumped sales (*i.e.*, zero). Not only would such action be unlawful under existing precedent from the Federal Circuit, it would completely undermine the Department’s recent announcement that it is ending the use of zeroing in reviews in order to comply with adverse WTO decisions⁵⁴ which defines that the terms “dumping margin” and “weighted average dumping margin,” applies to both investigations and reviews.
- In *Dongbu Steel*,⁵⁵ the Federal Circuit held that while previous decisions had affirmed the use of zeroing in both investigations and reviews, the Federal Circuit had not ruled on the issue of whether the Department was permitted to interpret the statute as providing for zeroing in reviews but not in investigations. The court noted that the Department had previously argued to the court that section 771(35) of the Act supported no distinction between reviews and investigations with respect to zeroing, and that the court had accepted this argument in its previous zeroing decisions.⁵⁶ Finally, the court held that the fact that the Department had amended its zeroing practice in original investigations in order to comply with a WTO decision did not establish that an inconsistent interpretation of section 771(35) of the Act was permissible as matter of U.S. law.⁵⁷
- Based on this analysis, the Federal Circuit held that the Department had failed to provide a reasonable explanation for interpreting section 771(35) of the Act differently in administrative reviews than in investigations and that: “in the absence of sufficient reasons for interpreting the same statutory provision inconsistently, Commerce’s action is arbitrary.”⁵⁸

⁵³ See section 777A(d)(1)(B) of the Act; Uruguay Round Agreements Act (URAA), SAA, H.R. Doc. No. 103-316, Vol. 1 (1994) at 843.

⁵⁴ See *Final Modification Reviews*.

⁵⁵ See *Dongbu Steel*, 635 F.3d at 1371.

⁵⁶ See *id.* at 1371-72.

⁵⁷ See *id.* at 1372.

⁵⁸ See *id.* at 1372-73.

- In *JTEKT*, the Department did address the issue of its inconsistent treatment of zeroing in investigations and reviews explaining “that one phase uses average-to-average comparisons while the other uses average-to-transaction comparisons;” but the court remanded to the Department to “explain why these (or other) differences between the two phases make it reasonable to continue zeroing in one phase, but not the other.”⁵⁹
- The Federal Circuit ordered a remand for the Department to provide the explanation required in *Dongbu Steel*.⁶⁰
- Under the holdings of *Dongbu Steel* and *JTEKT*, the Department is prohibited from applying the A-T comparison methodology with zeroing in this administrative review unless it can provide a reasonable explanation why the significant price differences could not be taken into account using the A-A or T-T comparison methodologies.⁶¹
- With respect to non-targeted sales, the Department cannot meet this statutory requirement because there is no reasonable explanation why such non-targeted sales could not be accounted for by the use of the A-A comparison methodology. By definition, sales that are not targeted are not suspected of targeted dumping and thus do not trigger the exception. The Department’s explanation in this case was that the price differences could not be taken into account because the A-T comparison methodology yields a material difference in the margin.⁶²
- Comparing the margins using the A-T and A-A is distortive because any rate differential is likely the result of zeroing - a practice that has been found to be WTO-inconsistent - rather than from a failure to unmask targeted dumping.
- The Department’s own withdrawn targeted dumping regulation provided that the A-T comparison methodology would only apply to sales that were found to be targeted.⁶³
- In sum, the Department’s decision to apply the A-T comparison methodology to all sales -targeted and not targeted- is unlawful because it is inconsistent with the statute, Congressional intent, and the Department’s previous position on this issue.

HYSCO’s Case Brief Arguments

- Even if the Department determines to make A-A transaction comparisons based on a finding of targeted dumping, it may not use the zeroing methodology when calculating the antidumping duty margin.
- The Federal Circuit has effectively prohibited the Department from using zeroing in average-to-average transaction comparisons in administrative reviews.

⁵⁹ See *JTEKT*, 642 F.3d at 1384-85.

⁶⁰ Dongbu notes that *JTEKT* has been remanded. See *JTEKT Corp. v. United States*, 2011 Ct. Intl. Trade LEXIS 158, Slip.Op.II-158 (2011). Dongbu also notes that subsequently the Court of International Trade has upheld the Department’s use of zeroing in reviews. See *Union Steel v. United States*, 823 F. Supp. 2d 1346 (2012), *appeal docketed*, No. 12- 1248 (Fed. Cir. March 20, 2012).

⁶¹ See section 777A(d)(1)(B)(ii) of the Act (d)(1)(B)(ii).

⁶² See Post-Preliminary Analysis at 3.

⁶³ See 19 CFR 351.414(f)(2). In response to comments on this particular aspect of its proposed targeted dumping regulation, the Department dismissed comments that the A-T comparison method should be used for all sales in cases where targeted dumping is found. See *Antidumping Duties; Countervailing Duties*, 61 FR 7308, 7350 (February 27, 1996).

- If the Department finds that HYSCO did engage in targeted dumping in this review, it should not apply the zeroing methodology in determining the antidumping duty margin.

U.S. Steel's Rebuttal Arguments

- The Department's use of the A-T comparison methodology without offsets to address targeting is consistent with case law and the Department's practice.
- Respondents' reliance on *Dongbu Steel* and *JTEKT* is misplaced, and those cases do not address administrative review involving targeted dumping. Rather, both *Dongbu Steel* and *JTEKT* acknowledge that the Department has discretion to employ the methodology without offsets so long as it provides a reasonable explanation for its different interpretations of the statute.

Nucor's Rebuttal Arguments

- The U.S. Court of International Trade (CIT) has upheld the practice of zeroing.
- When using the A-A method, it is the Department's practice to zero transactions with negative comparison results.

Department Position

We continue to find, for Dongbu, that a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or time periods does exist and, therefore, the Department has considered whether the A-A comparison method can account for such differences. Further, the Department finds that the A-A comparison methodology cannot account for such differences because there is a meaningful difference in the weighted-average dumping margins calculated using the A-A and A-T comparison methodologies and, therefore, the Department has continued to use the A-T comparison methodology to calculate the weighted-average dumping margin for Dongbu in these final results.⁶⁴

For HYSCO, we continue to find that a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or time periods does not exist and, therefore, the Department has not considered whether the A-T comparison methodology can account for the observed price differences. Therefore, the Department has continued to use the A-A comparison methodology to calculate the weighted-average dumping margin for HYSCO in these final results.⁶⁵

⁶⁴ See The final calculation memorandum for Dongbu dated concurrently with this memorandum.

⁶⁵ See Post-Preliminary Analysis, and the final calculation memoranda for HYSCO dated concurrently with this memorandum.

A. Application of Alternative Methodology and Targeted Dumping

The respondents claim that the Department does not have the statutory authority to employ an alternative comparison method and to use the targeted dumping analysis in administrative reviews. We disagree. Section 771(35)(A) of 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 normal value and export price or constructed export price. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act describes three methods by which the Department may compare normal value and export price (or constructed export price) and places certain restrictions on the Department’s selection of a comparison method in antidumping investigations. The statute places no such restrictions on the Department’s selection of a comparison method in administrative reviews. The Department’s regulations at 19 CFR 351.414 (b) describe the methods by which normal value may be compared to export price or constructed export price in antidumping investigations and administrative reviews, *i.e.*, A-A, T-T, and A-T. These comparison methods are distinct from each other. When using T-T or A-T comparisons, a comparison is made for each export transaction to the United States. When using A-A comparisons a comparison is made for each group of comparable export transactions for which the export prices, or constructed export prices, have been averaged together (*i.e.*, for an averaging group). The Department’s regulations at 19 CFR 351.414(c)(1) address the ambiguity in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping investigations and administrative reviews, the A-A method will be used “unless the Secretary determines another method is appropriate in a particular case.”

The antidumping duty statute, the SAA, and the Department’s regulations do not address directly whether the Department should use an alternative comparison method in an administrative review based upon a targeted dumping analysis conducted pursuant to section 777A(d)(1)(B) of the Act.⁶⁶ In light of the statute’s silence on this issue, the Department indicated that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, but declined to “speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed.”⁶⁷ At that time, the Department also indicated that it would look to practices employed by the Department in antidumping investigations for guidance on this issue.⁶⁸

In antidumping investigations, the Department examines whether to use an A-T method by using a targeted dumping analysis consistent with section 777A(d)(1)(B) of the Act:

⁶⁶ See section 777A(d)(1)(B) of the Act; SAA, at 842-43; 19 CFR 351.414.

⁶⁷ See *Final Modification for Reviews*, 77 FR at 8107.

⁶⁸ See *id.* at 8102.

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 normal values 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).

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review is, in fact, analogous to the issue in antidumping investigations. Accordingly, the Department finds the analysis that has been used in antidumping investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

The SAA does not demonstrate that the Department should conduct targeted dumping analysis in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) does not require or prohibit the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that "section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an A-A or T-T comparison methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods."⁶⁹ Like the statute, the SAA does not limit the proceedings in which the Department may undertake such an examination.

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

⁶⁹ See section 777A(d)(1)(B) of the Act; SAA, at 842-43; 19 CFR 351.414.

fill the silence with regard to administrative reviews.

Further, the Department's revision of its practice with regards to administrative reviews, and to follow its WTO-consistent practice for investigations, was a deliberate decision on the part of the Executive Branch pursuant to the authority provided in section 123 of the URAA. Specifically, the Executive Branch solicited public comments, consulted with the appropriate congressional committees, and issued a preliminary and final determination. This decision was made in order to implement several adverse WTO reports in which it was found that the United States was not meeting its WTO obligations. As such, the wisdom of the Department's legitimate policy choices in this situation is not subject to judicial review.⁷⁰

B. Withdrawal of Targeted Dumping Regulation

Dongbu asserts that the Department should have applied its now-withdrawn targeted dumping regulation in this case, 19 CFR 351.414(f), (g) and 351.301(d)(5). Although the Department withdrew its targeted dumping regulations in 2008, Dongbu asserts that the withdrawal was ineffective because it did not comply with the APA requirement that an agency solicit notice and comment. We disagree.

Dongbu's argument fails because the Department did provide proper notice and opportunity to comment. Contrary to Dongbu's claims, the Department did permit the public to participate in its rulemaking process. In fact, the Department's withdrawal of its regulations in December 2008 came after two rounds of soliciting public comments on the appropriate targeted dumping analysis.

The Department solicited the first round of comments in October 2007, more than one year before it withdrew the regulation by posting a notice in the *Federal Register* seeking public comments on what guidelines, thresholds, and tests it should use in conducting an analysis under section 777A(d)(1)(B) of the Act.⁷¹ As the notice explained, because the Department had received very few targeted dumping allegations under the regulations then in effect, it solicited comments from the public to determine how best to implement the targeted dumping remedy provided under the statute. The notice posed specific questions, and allowed the public 30 days to submit comments.⁷² Various parties submitted comments in response to the Department's request.⁷³

After considering those comments, the Department published a proposed new methodology in May of 2008 and again requested public comment.⁷⁴ Among other things, the

⁷⁰ See *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992).

⁷¹ See *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 FR 60651 (October 25, 2007).

⁷² See *id.*

⁷³ See Public Comments Received December 10, 2007, Dep't of Commerce, <http://ia.ita.doc.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html> (Dec. 10, 2007) (listing the entities that commented).

⁷⁴ See *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 FR 26371, 26372 (May 9, 2008).

Department specifically sought comments “on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping.”⁷⁵ However, numerous other parties submitted comments.⁷⁶

Several of these submissions explained that the Department’s proposed methodology was inconsistent with the statute and should not be adopted.⁷⁷ Moreover, several entities explicitly stated that the Department should not establish minimum thresholds for accepting allegations of targeted dumping because the statute does not contain any such requirements.⁷⁸

These comments suggested that the regulation was impeding the development of an effective targeted dumping methodology. Indeed, after considering the parties’ comments the Department became concerned that the regulation may have created improper threshold requirements for making a targeted dumping allegation that were inconsistent with the statute.⁷⁹ For this reason, the Department determined that the regulation had to be withdrawn.⁸⁰ And although this withdrawal was effective immediately, the Department again invited parties to submit comments, and gave them a full 30 days to do so.⁸¹ The comment period ended on January 9, 2009, with several parties submitting comments.⁸²

The course of the Department’s decision-making demonstrates that it sought to actively engage the public. This type of public participation is fully consistent with the APA’s notice-and-comment requirement.⁸³

Various courts have rejected the idea that an agency must give the parties an opportunity to comment before every step of regulatory development.⁸⁴ Rather, where the public is given the opportunity to comment meaningfully consistent with the statute, the APA’s requirements are satisfied. The touchstone of any APA analysis is whether the agency has, as a whole,

⁷⁵ See *id.*; see also Public Comments Received June 23, 2008, Dep’t of Commerce, <http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html> (June 23, 2008) (listing the entities that commented).

⁷⁶ See *id.*

⁷⁷ See, e.g., Comments of Various Domestic Producers, <http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/kdw-td-cmt-20080623.pdf> at 2; <http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/csustl-td-cmt-20080623.pdf>.

⁷⁸ See, e.g., <http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/csustl-td-cmt-20080623.pdf> at 25; <http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/kdw-td-cmt-20080623.pdf> at 29.

⁷⁹ See *Withdrawal Notice 2008*, 73 FR at 74931.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See Public Comments Received January 9, 2009, Dep’t of Commerce, (Jan. 23, 2009).

⁸³ See, e.g., *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000) (holding that the EPA’s decision to not implement a rule upon which it had sought comments did not violate the APA’s notice and comment requirements because the parties should have understood that the agency was in the process of deciding what rule would be proper).

⁸⁴ See *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (*Mineta*) (holding that the Department of Transportation’s promulgation of four rules, each with immediate effect, only after the issuance of which the public was given the opportunity to comment, afforded proper notice and comment).

acted in a way that is consistent with the statute's purpose.⁸⁵ Here, similar to the agency in *Mineta*, the Department provided the parties more than one opportunity to submit comments before issuing the final rule. As in *Mineta*, the Department also considered the comments submitted and based its final decision, at least in part, upon those comments. Just as the court in *Mineta* found all of those facts to indicate that the agency's actions were consistent with the APA, so too the Department's actions here demonstrate that it fulfilled the notice and comment requirements.

Indeed, Dongbu's arguments are based upon the presumption that any final rule that the agency promulgates is required to be identical to the rule that it proposes and upon which it solicits comments. But that position has been repeatedly rejected.⁸⁶ Here, the Department actively engaged the public in its rulemaking process; it solicited comments and considered the submissions it received. In fact, that the numerous comments prompted the Department to withdraw the regulation demonstrates that the Department provided the public with an adequate opportunity to participate. In doing so, the Department fully complied with the APA.

Dongbu's argument has been raised by respondents in prior proceedings, to no avail.⁸⁷ For example, in *Coated Paper from PRC*, the Chinese government argued that the Department's prior targeted dumping regulations were still effective, because the withdrawal was not preceded by a request for notice and comment.⁸⁸ The Department has repeatedly stated otherwise, noting that the regulation has been withdrawn, and that the Department cannot be constrained by a withdrawn regulation.⁸⁹

Moreover, the Department has explained that it found good cause existed to waive the notice and comment period.⁹⁰ The Department expressly articulated its reasons for withdrawing the regulation.⁹¹ That good cause existed is clear from the fact that the Department was, at the time of the withdrawal, dealing for the first time with actual targeting allegations in ongoing proceedings,⁹² and that the Department had previously published a notice asking for

⁸⁵ See *id.*

⁸⁶ See, e.g., *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

⁸⁷ See *Nails from UAE* and accompanying Issues and Decision Memorandum at Comment 4; see also *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 4.

⁸⁸ See *Certain Coated Paper Suitable for High Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 75 FR 59217 (September 27, 2010) (*Coated Paper from PRC*) and accompanying Issues and Decision Memorandum at Comment 3.

⁸⁹ See *Certain Steel Nails from the United Arab Emirates: Final Determination of Sales at Less than Fair Value*, 77 FR 17029 (March 23, 2012) (*Nails from UAE*) and accompanying Issues and Decision Memorandum at Comment 4; see also *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 4.

⁹⁰ See *Nails from UAE* and accompanying Issues and Decision Memorandum at Comment 4.

⁹¹ Although the Department did not conduct any targeted dumping analysis until after 2007, it had promulgated regulations regarding targeted dumping in 1997. After the discontinuation of zeroing, the Department noted that the regulations might have "prevented the use of {the targeted dumping} methodology to unmask dumping," and withdrew its regulations, with the stated intent of "analyz{ing} extensively the concept of targeted dumping and develop{ing} a meaningful practice in this area." See *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930, 74930 (December 10, 2008) (*Interim Final Rule*).

⁹² See *Nails from UAE*.

comments on methodologies applicable to targeted dumping allegations.⁹³ With its prior regulations no longer effective, the Department developed the *Nails Test* in 2008, after its first use in an antidumping duty investigation into certain steel nails from PRC.⁹⁴

The “good cause” exception provides that an agency is not required to engage in notice and comment if it determines that doing so would be “impracticable, unnecessary, or contrary to the public interest.”⁹⁵ The Federal Circuit has recognized that this exception can relieve an agency from issuing notice and soliciting comment where doing so would delay the relief that Congress intended to provide.⁹⁶ In *National Customs Brokers*, the Federal Circuit rejected a plaintiff’s argument that the United States Customs Service failed to follow properly the APA in promulgating certain interim regulations when Customs had published these regulations without giving the parties a prior opportunity to comment. Moreover, although Customs solicited comments on the published regulations, Customs stated that it “would not consider substantive comments until after it implemented the regulations and reviewed the comments in light of experience” administering those regulations.⁹⁷ Customs explained that good cause existed not to comply with the APA’s usual notice and comment requirements because the new requirements did not impose new obligations on parties, and emphasized its belief that the regulations should “become effective as soon as possible” so that the public could benefit from “the relief that Congress intended.”⁹⁸ The Court recognized that this explanation was a proper invocation of the “good cause” exception and explained that soliciting and considering comments was both unnecessary (because Congress had passed a statute that superseded the regulation) “and contrary to the public interest because the public would benefit from the amended regulations.”⁹⁹ For this reason, the Court affirmed the regulation against the plaintiff’s challenge.¹⁰⁰

The Department’s basis for invoking the “public interest” exception here is almost identical to the one that the Federal Circuit sustained in *National Customs Brokers*. The regulations that the Department withdrew were designed to implement the targeting dumping provision that Congress codified at section 777A(d)(1)(B)(ii) of the Act. However, these regulations were originally promulgated before the Department had ever performed a targeted dumping analysis.¹⁰¹ Perhaps reflecting this dearth of practical experience, the regulations imposed

⁹³ The Department published a request for comments on targeted dumping in antidumping investigations shortly after the discontinuation of zeroing in investigations. See *Targeted Dumping in Antidumping Investigations*, 72 FR 60651 (October 25, 2007) (Request for Comment 2007). It subsequently also issued a request for comment on a proposed methodology, *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 FR 26371 (May 9, 2008) (Request for Comment 2008).

⁹⁴ See, e.g., *Mid Continent Nail*, CIT Slip Op. 10-48 at 3-6 (describing development of the *Nails Test*).

⁹⁵ See 5 U.S.C. § 553(b)(B).

⁹⁶ See, e.g., *National Customs Brokers and Forwarders Ass’n of Am., Inc. v. United States*, 59 F.3d 1219, 1223 (Fed. Cir. 1995).

⁹⁷ See *id.* at 1220–21.

⁹⁸ See *id.* at 1223.

⁹⁹ See *id.* at 1224.

¹⁰⁰ See *id.*

¹⁰¹ See *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27374–76 (May 19, 1997) (final rule); 19 CFR 351.414(f), (g) and 351.301(d)(5) (1997).

several requirements that were not part of the statute.¹⁰² After receiving comments on various proposals to amend its methodology under this regulation and deliberating on the issue, the Department determined that the regulations “may have established thresholds or other criteria that ha{d} prevented the use of this {alternative targeted dumping} comparison methodology to unmask dumping.”¹⁰³ These criteria, the Department noted, were inadvertently denying “relief to domestic industries suffering material injury from unfairly traded imports”—relief that Congress intended to grant by passing the targeted dumping provision in the first instance.¹⁰⁴ Immediate withdrawal of the regulation was therefore necessary to allow parties to take advantage of the statutory remedies. This interest in granting congressionally-mandated relief without undue delay is exactly the basis upon which the Federal Circuit sustained the agency’s invocation of the “public interest” exception to notice and comment procedures in *National Customs Brokers*.

In fact, the only difference between this case and *National Customs Brokers* is that in the latter Congress passed a statute that affirmatively abrogated the prior regulation. But this distinction is insignificant. When an administering agency finds that the effect of a regulation is to curtail statutorily mandated relief, the agency may act to remedy that situation, regardless of whether the statutory mandate is new or old. Nor does the fact that the Department was not aware of this potential effect for a period of time justify additional delay. Rather, it was appropriate for the Department to revoke the regulation as soon as it became apparent that there may be an effect “contrary to {Commerce’s} intention in promulgating the provisions and inconsistent with {Commerce’s} statutory mandate. . .”¹⁰⁵ Immediate revocation was all the more appropriate given that the Department had *already* conducted two rounds of notice and comment and received suggestions that the regulation may have been improper.

Moreover, courts have at various times suggested that a multitude of different factors can form grounds for a determination that the public interest supports a shortened comment period and an immediate effective date for a regulation.¹⁰⁶ To be sure, courts have suggested that these factors do not include generalized interests in fiscal savings or other efficiencies.¹⁰⁷ But an agency’s concern that a regulation may have an effect that is contrary to the Department’s statutory mandate and congressional intent is not this kind of generalized interest. Moreover, as explained above, the Department’s withdrawal of the regulation came after *two full rounds* of notice and comment, and provided for additional

¹⁰² Compare 19 U.S.C. § 1677f-1(d)(1)(B) with 19 CFR 351.414(f), (g). For example, 19 CFR 351.414(f)(2) provided that the Department would normally limit the application of the transaction-to-average methodology to those sales that constituted targeted dumping, while the statutory provision does not contain this limitation. Similarly, the regulations provided that an allegation of targeted dumping is due no later than thirty days before the scheduled date of the preliminary determination—a requirement that is not present in the statute. See 19 CFR 351.414(f)(3) and 351.301(d)(5).

¹⁰³ See *Withdrawal Notice 2008*, 73 FR at 74931.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See, e.g., *Omnipoint Corp. v. F.C.C.*, 78 F.3d 620, 630 (D.C. Cir. 1996) (crediting the agency’s explanation that a shortened comment period was necessary because the usual comment procedures “would undermine the public interest by delaying additional competition in the wireless marketplace”).

¹⁰⁷ See, e.g., *Levesque v. Block*, 723 F.2d 175, 185 (1st Cir. 1983).

comment opportunities after the regulation went into effect.

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

The Department has since further refined its analysis in proceedings involving targeted dumping allegations in both investigations and administrative reviews.¹⁰⁸ Dongbu has raised no new arguments addressing the Department's previous findings on this issue; therefore, there is no basis for the Department to revisit or revise its position in the instant case.

We also disagree with Dongbu's arguments that notice-and-comment procedures should attend each change made to the *Nails* Test, because the change significantly affected the rights of respondent interested parties, and the changes are not a logical outgrowth of the original rule. As the Department has noted, there are no current regulations regarding targeted dumping. Rather, the Department withdrew its regulations because it realized that targeted dumping was an important and emerging area that would require careful consideration, and the development of new methodologies.¹⁰⁹ The Department sought to refine the *Nails* Test in the Post-Preliminary Analysis to ensure that masked dumping was properly addressed. In adopting the *Nails* Test, the Department did not promulgate a rule. By further refining the *Nails* Test in subsequent cases, the Department did not create a new rule within the meaning of the APA. Accordingly, Dongbu's argument is unpersuasive.

C. Department's Targeted Dumping Analysis

In recent antidumping investigations and administrative reviews where the Department has addressed targeted dumping allegations, the Department has employed the *Nails* Test for each respondent subject to an allegation to determine whether a pattern of export prices or constructed export prices for comparable merchandise that differ significantly among purchasers, regions or time periods existed within the U.S. market. The *Nails* Test involves a two-step process, as described below, that determines whether the Department should consider whether the A-A method is appropriate in a particular situation. In the first stage of the test, the "standard-deviation test," we determined the volume of the allegedly targeted group's (*i.e.*, purchaser, region or time period) sales of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted- average price of all sales under review, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (*i.e.*, by CONNUM) using the weighted-average prices for the alleged targeted group and the groups not alleged to have

¹⁰⁸ See, *e.g.*, *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Final Results of Antidumping Duty Administrative Review*, 77 FR 72818 (December 6, 2012); *Nails from UAE*.

¹⁰⁹ See *Interim Final Rule*, 73 FR at 74931. See also Request for Comment 2007.

been targeted. If that volume did not exceed 33 percent of the total volume of the 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 the 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, the "gap test," we examined all sales of identical merchandise (*i.e.*, by CONNUM) sold to the allegedly targeted group which passed the standard-deviation test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales for allegedly targeted group and the next higher weighted-average price of sales to the non-targeted groups exceeds the average price gap (weighted by sales volume) for the non-targeted groups. We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of prices for the non-targeted groups that defined the price gap. In doing this analysis, the allegedly targeted group's sales were not included in the non-targeted groups; the allegedly targeted group's average price was compared only to the average prices for 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 and these sales passed the *Nails* Test.

As explained in the Post-Preliminary Analysis, if the Department determined that a sufficient volume of U.S. sales were found to have passed the *Nails* Test, then the Department considered whether the A-A 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 A-A method and the weighted-average dumping margin calculated using the A-T method. Where there is a meaningful difference between the results of the A-A method and the A-T method, the A-A method would not be able to take into account the observed price differences, and the A-T method would be used to calculate the weighted-average margin of dumping for the respondent in question. Where there is not a meaningful difference in the results, the A-A method would be able to take into account the observed price differences and the A-A method would be used to calculate the weighted-average dumping margin for the respondent in question.

The Department disagrees with Dongbu's claim that the Department's analysis is both flawed and arbitrary. Specifically, Dongbu made the following six claims with respect to the revised *Nails* Test used in the Department's Post-Preliminary Analysis:

- (1) the test should include a check to determine whether sales prices are normally distributed, (2) the test fails to adhere to the statutory requirement that it test for patterns in "export prices" because it relies on weight-averaged prices, (3) it is not clear what the second portion of the *Nails* Test actually measures nor why that measurement is meaningful, (4) the test unreasonably relies on sales that are targeted, but not dumped, (5) the test fails to measure whether significant differences exist, and (6) the agency has not announced bright-line standards for what constitute

“sufficient sales” or a “meaningful difference” for purposes of determining whether to use the A-T comparison methodology.

As discussed below, the Department disagrees with each of Dongbu’s six arguments because none of them is persuasive.

1. Requirement to Test for a Normal Distribution

Dongbu asserts that the first stage of the Department’s *Nails Test*¹¹⁰ is flawed because it fails to test whether the overall price data follow a normal distribution. As pointed out by Nucor,¹¹¹ in its decision in *Mid Continent Nail*¹¹² where respondent challenged the Department’s implicit assumption with respect to the distribution of data under the *Nails Test*, the CIT upheld the Department’s use of standard deviation in the *Nails Test*.¹¹³ In so doing, the CIT rejected arguments that the test arbitrarily assumed a normal distribution of data.¹¹⁴ Consistent with the above CIT decision, the Department finds that there is no requirement that the *Nails Test* needs to test for a normal distribution of the data.

2. Reliance on Weighted-Average Prices

Dongbu asserts that the Department’s *Nails Test* analyzes weighted-average prices by CONNUM, rather than individual prices, which violates sections 777A(d)(1)(B) and 777a(a) of the Act.¹¹⁵ However, the Department has already rejected similar arguments that the *Nails Test*’s reliance on weighted-average pricing is unlawful.¹¹⁶ In *Washers from Korea*, the Department found that the focus of the statute is not 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.”¹¹⁷ As the Department noted in *Coated Paper from PRC*, “[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).¹¹⁸ Using weighted averages allows the Department to disregard meaningless variations and focus instead on uncovering a pattern of

¹¹⁰ The first stage of the *Nails Test* determines whether allegedly targeted sales are made at prices more than one standard deviation below the weighted-average price of all sales under review.

¹¹¹ See Nucor’s rebuttal brief at 15.

¹¹² See, e.g., *Mid Continent Nail*, CIT Slip Op. 10-48 at 11-13.

¹¹³ See *id.*

¹¹⁴ See Mem. of Law in Support of Plaintiffs’ Rule 56.2 Motion for Judgment on the Agency Record, *Mid Continent Nail Corporation v. United States*, CIT Ct. No. 08-225, Docket No. 36 (Feb. 20, 2009) at 25, 32-33.

¹¹⁵ Section 777A(d)(1)(B) of the Act describes “a pattern of export prices . . . that differ significantly among purchasers, regions, or periods of time,” and section 772(a) of the Act defines export price as “the price at which the subject merchandise is . . . sold.”

¹¹⁶ See *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 4. See also *Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers From the Republic of Korea*, 77 FR 75988 (December 26, 2012) (*Washers from Korea*) and accompanying Issues and Decision Memorandum at Comment 3.

¹¹⁷ See section 777A(d)(1)(B)(i) of the Act (emphasis added).

¹¹⁸ See *Coated Paper from PRC* and accompanying Issues and Decision Memorandum at Comment 3.

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* A-A comparisons and T-T 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. In *Huvis*,¹¹⁹ the Federal Circuit Court held 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, Dongbu has not demonstrated that weight-averaging individual sales prices for each group is unreasonable.

Similarly, in *Wood Flooring*, the Government of China argued that the statute suggests that individual prices should be used instead of average prices. The Department countered that the statute states that Commerce may apply its targeted dumping methodology if "there is a pattern of EPs (or CEPs) for comparable merchandise . . ."¹²⁰ The Department indicated that it was exercising its discretion to interpret EPs as an average of the individual prices to the customer.¹²¹ Furthermore, the Department found that it was appropriate to rely on weighted-average export prices, rather than individual prices, because the second stage of the *Nails Test* (*i.e.*, the gap test) is performed on a weighted-average basis.¹²² Because Dongbu provides no compelling reason on this issue, consistent with *Coated Paper from PRC* and *Wood Flooring*, the Department continues to rely on weighted-average prices in the *Nails Test* in these final results.

3. The Magnitude of Gaps and Randomness

Dongbu argues that it is not clear how or why the second stage of the *Nails Test*, *i.e.*, the gap test, accomplishes the goal of determining whether the prices "differed significantly" for a given pattern of price differences. Dongbu states that the price gaps that the Department is measuring should be more or less random, such that nothing meaningful can be determined from the relative size of those gaps.

The Department has previously rejected this argument, explaining that the "gap test qualifies whether a degree of separation between a low targeted price and the next lowest non-targeted price is sufficient in determining the significant difference in prices with respect to the targeted sales."¹²³ Furthermore, the Department has stated that while randomness might explain the gaps in a hypothetical dataset, this is not true of the gaps in a targeting situation.¹²⁴ Because Dongbu provides no additional reason on this issue,

¹¹⁹ See *Huvis Corp. v. United States*, 570 F.3d 1347, 1354–55 (Fed. Cir. 2009) (*Huvis*).

¹²⁰ See section 777A(d)(1)(B)(i) of the Act.

¹²¹ See *Coated Paper from PRC* and accompanying Issues and Decision Memorandum at Comment 3.

¹²² See *id.*

¹²³ See *Nails from UAE* and accompanying Issues and Decision Memorandum at Comment 2.

¹²⁴ See *id.*

consistent with *Nails from UAE*, the Department made no changes to the *Nails* Test used in the Post-Preliminary Analysis in these final results.

4. Non-Dumped Targeted Sales

Dongbu argues that only a limited universe of Dongbu's sales were dumped sales which cannot support the use of the A-T comparison methodology with zeroing to all Dongbu's sales; rather the non-dumped sales should be excluded from the targeted dumping analysis. We disagree. Section 777A(d)(1)(B)(i) of the Act, to which the Department refers for guidance in the context applying this analysis in this administrative review, describes whether there is a "pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." Section 777A(d)(1)(B) of the Act does not refer to a pattern of dumped sales or dumping margins; nor does it call for a comparison of the export prices or constructed export prices to normal value prior to determining whether there is a pattern. Similarly, the *Nails* Test, affirmed in *Mid Continent Nail*, seeks only to determine whether a pattern of export prices or constructed export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods exists within the U.S. market. The CIT has found that this test "do{es} not violate the statutory language" of section 777A(d)(1)(B)(i) of the Act.¹²⁵ Therefore, we find that the Department has acted consistent with congressional intent.

5. Gap Test and Measurement of Significance of Differences between Targeted and Non-Targeted Prices

Dongbu alleges that the Department's gap test fails to properly capture and meet the significant difference requirement of the statute and it is arbitrary and inaccurately disregards sales prices below the allegedly targeted sales prices, instead proceeding to the next highest price. In addition, Dongbu claims that the Department's methodology does not establish a pattern of prices which differ significantly from non-targeted prices. We disagree. The Department has explained in several past cases how the gap test identifies significant differences in prices.¹²⁶ For example, in *Wood Flooring*,¹²⁷ the Department found that the only limitations that section 777A(d)(1)(B) of the Act places on the application of the alternative A-T comparison methodology are the satisfaction of the criteria set forth in the provision.¹²⁸ The gap test is designed and used by the Department in the *Nails* Test to determine whether the identified pattern of prices that differ satisfies the significance requirement. For the gap test, the Department first examines all sales of identical merchandise (*i.e.*, by CONNUM) by a respondent to the allegedly targeted customer. From those sales, the Department determines the total volume of sales for which the difference between the weighted-average price of sales to the allegedly targeted customer and the next higher weighted-average price of sales to a non-targeted group.¹²⁹ The Department weights

¹²⁵ See *Mid Continent Nail Com. v. United States*, Slip. Op. 2010-47 at 14.

¹²⁶ See, *e.g.*, *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 4.

¹²⁷ See *id.*; see also *Carrier Bags from Taiwan* and accompanying Issues and Decision Memorandum at Comment 1.

¹²⁸ See *Nails* Test and accompanying Issues and Decision Memorandum at Comment 3.

¹²⁹ See *Coated Paper from PRC* and accompanying Issues and Decision Memorandum at Comment 6. The next

each of the price gaps in the non-targeted group by the combined sales volume associated with the pair of prices to non-targeted customers that make up the price gap. If the share of the sales that meets this test exceeds five percent of the total sales volume of subject merchandise to the allegedly targeted customer, the significant difference requirement is met and the Department determines that customer targeting has occurred.¹³⁰ In such case, the Department will evaluate the extent to which applying the alternative A-T methodology to all U.S. sales unmasks targeted duping not accounted for using the standard A-A comparison methodology.¹³¹ As such, the Department's gap test is well designed and not arbitrary.

Furthermore, in responding to Government of the People's Republic of China's comment, the Department made two modifications to its SAS programming codes to run the price gap in *Wood Flooring*. In the first modification, the Department modified its SAS programming code by comparing the targeted price with only the lowest non-targeted price (above the targeted price), by CONNUM/customers. While revising its SAS programming code, the Department found another error in the SAS code.¹³² The Department corrected its SAS programming code by assigning a simple price gap (the difference between the previous non-targeted weight averaged price and the non-targeted weight averaged price for a given CONNUM) to calculate a weight averaged gap.¹³³ The Department's continuing effort to refine the gap test in order to properly capture and meet the significant difference requirement of the statute is clear. Therefore, the Department's comparison to the next highest price in the gap test is not arbitrary, nor did it inaccurately disregard sales prices below the allegedly targeted sales prices. Moreover, as stated above, in *Mid Continent Nail*, the CIT has found that this test "do(es) not violate the statutory language" of section 777A(d)(1)(B)(i) of the Act.¹³⁴ Therefore, we find that the Department has acted consistent with congressional intent.

Finally, 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.¹³⁵ We do not agree with Dongbu'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, Dongbu does not demonstrate why the significant-difference requirement can only be met by the use of gaps that both "look up" and "look down."¹³⁶

higher price is the weighted-average price to the non-targeted group that is above the weighted-average price to the alleged targeted group. For example, if the weighted-average price to the alleged targeted group is \$7.95, and the weighted-average prices to the non-targeted group are \$8.30, \$8.25, and \$7.50, we would calculate the difference between \$7.95 and \$8.25.

¹³⁰ See *id.* at Comment 4.

¹³¹ See *Carrier Bags from Taiwan* and accompanying Issues and Decision Memorandum at Comment 1, and *OCTG from China* and accompanying Issues and Decision Memorandum at Comment 2.

¹³² The Department found that the weight-averaged non-targeted price gap was calculated based on incorrect cumulated non-targeted price gap values.

¹³³ See *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 4.

¹³⁴ See *Mid-Continent Nail Com. v. United States*, Slip. Op. 2010-47 (2010) at 14.

¹³⁵ See, e.g., *Wood Flooring*.

¹³⁶ See *Nails from UAE*.

6. Guidelines for “Sufficient Sales” or “Meaningful Differences”

Dongbu states that the Department should offer guidelines to define “sufficient sales” to merit the use of the A-T comparison methodology, or guidelines to define “meaningful differences” between the dumping margins calculated using the A-A comparison methodology and the A-T comparison methodology. We disagree. In the present case, the percentage of Dongbu’s sales found to be targeted were sufficient to support the Department’s finding that consideration of the A-T comparison method is appropriate. In addition, application of the A-A method for Dongbu fails to account for such differences with the effect that the amount of dumping demonstrated using the A-T method is masked A-A method. It has been the Department’s practice to analyze it on a case-by-case basis.¹³⁷ This case does not present circumstances that would require the Department declare a “bright-line test.”

We also disagree with U.S. Steel’s arguments that the Department improperly went beyond the two-step analysis in the *Nails* Test to determine the percentages of U.S. sales that passed the *Nails* Test and then used those percentages to determine whether there is the requisite price pattern for U.S. sales of comparable merchandise that differs significantly among certain purchasers, regions, or periods of time. The Department rejected the respondent’s argument in *Wood Flooring*, and explained that “establishing a *de minimis* standard would not be appropriate because once the Department finds any instances of targeted dumping, the Department has determined that application of the A-T comparison methodology is necessary to fully analyze the extent of the dumping that is taking place.”

Rather, the Department realized that addressing masked dumping and the application of an alternative comparison methodology was an important and emerging area that would require careful consideration. Therefore, the Department developed *Nails* Test and has continued to evaluate and refine its practice in this area.¹³⁸ In the instant review, the Department lawfully exercised its discretion to seek to refine *Nails* Test in the Post-Preliminary Analysis to ensure that masked dumping was properly addressed. Furthermore,

¹³⁷ See *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 3396, 3398 (January 16, 2013) (“the Department examines the results of the *Nails* Test as described above and determines, on a case-by-case basis, whether the volume of sales found to be targeted are sufficient to justify a finding that the pattern requirement has been satisfied”); *Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011*, 77 FR 73415, 73417 (December 10, 2012) (“... the Act states that the Department “may” determine whether to use the A-T method to calculate the weighted-average dumping margin if the two criteria, (i) and (ii), are satisfied. Therefore, even if both prongs are met, the statute does not obligate the Department to use the A-T method, or any alternative method, to calculate the weighted-average dumping margin. . . we normally calculate weighted-average dumping margins in both investigations and administrative reviews using the A-A method. . . We only depart from this where the facts warrant. . .” (citations omitted)); *Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 9668 (February 11, 2013) and accompanying Issues and Decision Memorandum, at Comment 1 (“As explained in the Post-Preliminary Analysis, if the Department 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”).

¹³⁸ See *Interim Final Rule*, 73 FR at 74931. See also Request for Comment 2007.

the Department has previously rejected attempts to impose a *de minimis* standard when evaluating the results of the *Nails* Test. Instead, it has been the Department's practice to analyze this issue on a case-by-case basis, and the Department's decision with respect to the existence of a pattern of export prices that differ significantly here is consistent with the Department's past cases.¹³⁹ Accordingly, U.S. Steel's argument is unpersuasive.

D. Application of *Nails* Test

With regards to Dongbu's argument that pursuant to the clear Congressional intent stated in section 777A(d)(1)(B) of the Act and the SAA, the A-T comparison methodology can only be used with respect to "targeted sales" in this review, we disagree. The Act states that the A-T comparison methodology may be appropriate where there is "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time."¹⁴⁰ In this case, we found that "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time" exists with respect to Dongbu, and therefore, we continue to use the A-T method to calculate the weighted-average dumping margin for Dongbu in the final results.

Section 777A(d)(1)(B) of the Act expressly provides that the A-T methodology is an "[e]xception" to using the average-to-average or transaction-to-transaction methodology. Section 777A(d)(1)(B) further states that Commerce may invoke this exception where two conditions are met: (1) a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (2) the administering authority explains why such differences cannot be taken into account using the A-A or T-T methodology. Beyond these two conditions, nothing in the statute restricts the Department's application of the A-T methodology. No language in the statute suggests that this exception is partial, or that its use is limited to certain sales.

The Department has previously rejected arguments similar to those of Dongbu, and has found that, where targeting is discovered, the A-T comparison methodology will be applied to all sales.¹⁴¹ For example, in *Wood Flooring*,¹⁴² the Department found that the statute does not limit the A-T comparison methodology to targeted sales alone:

The Department disagrees with the . . . suggestion{ } to modify the Department's current targeted dumping test and only apply the A-T method to the percent of sales affected by targeted dumping and not the entire U.S. sales database. . . The only limitations that Section 777A(d)(1)(B) of the Act places on the application of the alternative A-T comparison methodology are the satisfaction of the two criteria set forth in the provision. When the criteria for application of the alternative A-T

¹³⁹ See footnote 138, *supra*.

¹⁴⁰ See section 777A(d)(1)(B)(i) of the Act.

¹⁴¹ See *Nails from UAE* and accompanying Issues and Decision Memorandum at Comment 3.

¹⁴² See *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 4; see also *Carrier Bags from Taiwan* and accompanying Issues and Decision Memorandum at Comment 1.

comparison methodology are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the alternative A-T comparison methodology to certain transactions. Rather, the provision expressly permits the Department to determine dumping margins by comparing weighted-average {normal values} to the {export price or constructed export price} of individual transactions.¹⁴³

Here, applying the A-T methodology to all of Dongbu's sales is the most effective way to unmask targeted dumping, and to implement the statute's goal. Targeted and non-targeted sales are not independent; rather, an exporter who engages in targeted dumping can offset its dumped sales to one customer with profitable sales to other customers. The Federal Circuit has recognized that in such circumstances profitable sales will "serve to 'mask' sales at less than fair value."¹⁴⁴ Because these non-dumped sales play an important role in an exporter's dumping practice, it is reasonable for the Department to apply the targeted-dumping remedy to *all* sales that may be involved. By applying the A-T methodology to all sales (including the profitable sales that the exporter used to mask its dumping through offsetting) the Department eliminates the offsetting that masks dumping.

As U.S. Steel pointed out, SAA does not show a clear Congressional intent to apply the A-T comparison methodology only to a portion of respondent's sales. Rather, the Department is permitted to apply the A-T comparison methodology to all of a respondent's sales where targeting is identified in order to ensure that respondents cannot "conceal" their masked dumping on sales to a particular group by making higher-priced sales to the non-targeted group that offset the dumping margins attributable to the targeted sales.¹⁴⁵

Further, applying the A-T methodology to all sales, rather than to only the targeted sales and using a different methodology for the remainder, is consistent with the Department's general calculation methodology. For example, outside of targeted dumping, section 777A(d)(1)(A) of the Act requires the Department to use either (1) A-A or (2) T-T comparisons. The Department does not combine the two methodologies in any one case; it does not apply T-T comparisons for certain sales and A-A comparisons for the remainder. Rather, it selects which of these methodologies is more appropriate, and applies the selected methodology uniformly to all of a respondent's transactions.

Finally, as discussed above, the Department's former regulation regarding targeted dumping has been withdrawn, and thus no longer binds the Department.¹⁴⁶ Dongbu cannot now reanimate that regulation to defeat the Department's subsequent decisions. Moreover, the Department's previous practice does not make its current interpretation of the statute unreasonable. The agency may change its approach so long as it provides an adequate explanation for doing so.¹⁴⁷ As we explain here, applying the A-T comparison to all of

¹⁴³ See *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 4.

¹⁴⁴ See *United States Steel Corp. v. United States*, 621 F.3d 1351, 1361 (Fed. Cir. 2010) (*United States Steel*).

¹⁴⁵ See SAA at 842.

¹⁴⁶ See *Wood Flooring* and accompanying Issues and Decision Memorandum at Comment 4.

¹⁴⁷ See *Huvis*, 570 F.3d at 1354-55 (holding that the Department may change its past practice when there are good reasons for the new policy); see also *Nakornthai Strip Mill Pub. Co. v. United States*, 587 F. Supp. 2d 1303,

respondents' sales unmasks dumping that would otherwise be concealed.

Consistent with SAA, the Department's decisions in *Wood Flooring* and in *Nails from UAE*, the Department continues to choose the appropriate comparison methodology and applies it uniformly for all comparisons between normal value and export price or constructed export price.¹⁴⁸

E. Application of Zeroing

Finally, Dongbu and HYSCO challenge the Department's determination to use its zeroing methodology in this case. However, the Federal Circuit has recognized that there is a basis to apply zeroing in the context of targeted dumping even if the Department does not apply zeroing in other types of investigations.¹⁴⁹ At issue in *United States Steel* was the Department's implementation of an adverse WTO report. As part of this implementation, the Department ceased zeroing in investigations using *only* average-to-average comparisons. The Federal Circuit sustained this implementation and held that the Department could discontinue zeroing in the context of A-A comparisons in investigations. Rejecting appellant's contention that the statute was rendered meaningless unless the Department applied zeroing in *all* comparisons, the Court held that the statute retained its meaning so long as the Department intended to use zeroing in the targeted dumping comparisons.¹⁵⁰ Further, as the Court explained, the domestic industry would still have an adequate remedy for targeted dumping because "Commerce has indicated that it likely intends to continue its zeroing methodology" in the context of average-to-transaction comparisons performed under section 777A(d)(1)(B) of the Act.¹⁵¹ This reasoning echoed the trial court's finding that the Department's cessation of zeroing in A-A investigations was reasonable because the Department would still continue to use zeroing in targeted dumping investigations, thus continuing to afford petitioners the same types of protections that they received under the Department's prior practice.¹⁵² Both this Court and the Federal Circuit have recognized that the Department intended to use zeroing in targeted dumping investigations and did not determine that doing so was problematic. To the contrary, both this Court and the Federal Circuit held that zeroing in the context of targeted dumping investigations was *consistent* with the Department *not zeroing* in regular A-A investigations, and indeed, saved the integrity of the statute as a whole.

Furthermore, even absent the *United States Steel* decision, the Department may interpret the statute as permitting the use of zeroing for purposes of the targeted dumping analysis but not requiring the use of zeroing for other types of comparisons. This Court has held that different methodologies employed by the Department in different segments of the proceeding justify different interpretations of the statute.¹⁵³ Specifically, in *Union Steel* the Court

1307-08 (CIT 2008) ("Commerce has 'discretion to change its policies and practices as long as they are reasonable and consistent with their statutory mandate").

¹⁴⁸ See, e.g., *Nails from UAE* and accompanying Issues and Decision Memorandum at Comment 4.

¹⁴⁹ See *United States Steel*, 621 F.3d at 1360.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See *United States Steel Corp. v. United States*, 637 F. Supp. 2d 1199, 1214–15 (Ct. Int'l Trade 2009).

¹⁵³ See *Union Steel v. United States*, 823 F. Supp. 2d 1346, 1360 (Ct. Int'l Trade 2012) (*Union Steel*) (affirming the

upheld the explanation that the Department provided for zeroing in administrative reviews but *not zeroing* in investigations because the Department used an A-T comparison in the first and an A-A comparison in the second.¹⁵⁴ This reasoning was repeated by the Court in the other cases,¹⁵⁵ and is equally applicable here: because the Department uses A-T comparisons to address targeted dumping in its investigations, while its other investigations generally use A-A comparisons, the Department is justified in interpreting the statute to permit zeroing in the first context but not require it in the second.

Further, we disagree that *Dongbu Steel* and *JTEKT* call into question the Department's zeroing methodology in administrative reviews. What the courts called into question was the Department's resolution of ambiguity in section 771(35) of the Act by reference to the context of the comparison method being applied, specifically, the A-A comparison method in antidumping investigations and the A-T comparison method in administrative reviews.¹⁵⁶ Moreover, the courts did not say that the Department's determinations in these proceedings were unlawful; rather, they asked for a further explanation to support the Department's interpretation of section 771(35) of the Act.¹⁵⁷ The Department has provided its explanation in *Dongbu Steel*, *JTEKT*, and numerous other proceedings justifying its interpretation of section 771(35) of the Act where offsets are granted when using the A-A method and offsets are not granted when using the A-T method. The CIT has affirmed this explanation on several occasions.¹⁵⁸

We further reject the respondents' assertion that the Department's determination in this administrative review is in conflict with the *Final Modification for Reviews*. The *Final Modification for Reviews* was implemented by the Executive Branch, pursuant to section 123 of the URAA, to change the Department's practice related to zeroing in administrative reviews in order to make it consistent with certain WTO panel and appellate body determinations. Neither the *Final Modification for Reviews*, nor the WTO panel and appellate body determinations, involved the use of an alternative comparison method applied to address the case-specific circumstances presented here. Furthermore, no WTO panel or

Department's explanation) (appeal pending).

¹⁵⁴ See *Union Steel*, 823 F. Supp. 2d at 1360.

¹⁵⁵ See, e.g., *Fischer S.A. Comercio v. United States*, 2012 Ct. Int'l Trade LEXIS 149 at *34 (Ct. Int'l Trade Dec. 6, 2012) (affirming Commerce's explanation); *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, 880 F. Supp. 2d 1348 (CIT 2012) (same); *Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, 853 F. Supp. 2d 1352 (CIT 2012) (*Grobest*) (same); *Far Eastern New Century Corp. v. United States*, No. 11-415, 2012 CIT 112 at *7 (Ct. Int'l Trade Aug. 29, 2012) (same).

¹⁵⁶ We note that since the CAFC issued its opinions in *Dongbu* and *JTEKT*, the Department has revised its practice in administrative reviews to follow that in antidumping investigations. See *Final Modification in Reviews*. As a result, the effect of the request posed by the court is an explanation of the different interpretations of section 771(36) of the Act between the average-to-average comparison methodology and the average-to-transaction comparison methodology without reference to antidumping investigations or administrative reviews. See also *Dongbu*, 635 F.3d at 1371, and *JTEKT*, 642 F.3d at 1381-1383.

¹⁵⁷ See *id.*

¹⁵⁸ See *Union Steel*; *Grobest*; *Far Eastern New Century Corp. v. United States*, Slip Op. 12-110 (Ct. Int'l Trade Aug. 29, 2012); *Camau Frozen Seafood Processing Imp. Exp. Corp. v. United States*, Slip Op. 12-137 (Ct. Int'l Trade Nov. 15, 2012); and *Fischer S.A. Comercio, Industria v. United States*, 2012 Ct. Intl. Trade 149, Slip-Op 12-149 (CIT Dec. 6, 2012).

appellate body determination has addressed the use of an alternative comparison methodology applied pursuant to section 777A(d)(1)(B) of the Act or the second sentence of article 2.4.2 of the WTO Antidumping Agreement. Dongbu and HYSCO's arguments are therefore unpersuasive.

Company Specific Issues

I. DONGBU

Comment 2: Post-Preliminary Analysis Regarding Targeted Time Period

U.S. Steel's Arguments

- The Department's targeted dumping analysis regarding time period is flawed.¹⁵⁹ Specifically, the Department inadvertently left out a portion of the targeted sales by time period in terms of both value and volume.¹⁶⁰
- The Department should correct the summary of its targeted dumping determination for Dongbu in the final results.

Dongbu did not comment on this issue.

Department Position

The Department agrees with U.S. Steel and has corrected the summary of its targeted dumping analysis for Dongbu based on the volume and value tables of the *Nails* Test in the final results.¹⁶¹

Comment 3: Targeted Customer Code

U.S. Steel's Arguments

- In the Post-Preliminary Analysis for Dongbu, the Department incorrectly identified one of the targeted customer codes in the margin program.¹⁶² This resulted in this customer's exclusion from the targeted dumping analysis.
- While the Department should not go beyond the two-step analysis in the *Nails* Test, to

¹⁵⁹ See Memorandum to the File from Cindy Robinson, Sr. International Trade Compliance Analyst, AD/CVD Operations, Office 3, entitled "Preliminary Results in the 18th Administrative Review on Corrosion-Resistant Carbon Steel Flat Products from Korea: Calculation Memorandum for Dongbu Steel," dated August 30, 2012 (Dongbu Prelim Calculation Memorandum) at 2.

¹⁶⁰ See *id.*

¹⁶¹ See Memorandum to the File from Cindy Robinson, Sr. International Trade Compliance Analyst, AD/CVD Operations, Office 8, entitled "Final Results in the 18th Administrative Review on Corrosion-Resistant Carbon Steel Flat Products from Korea: Calculation Memorandum for Dongbu Steel," dated March 7, 2013 (Dongbu Final Calculation Memorandum) and the final Margin Program output at pages 117-118.

¹⁶² See Dongbu Prelim Calculation Memorandum.

the extent it continues to do so for the final results, it should correct the ministerial errors made in calculating the percentages of Dongbu's sales found to be targeted by customer and time period.

Dongbu did not comment on this issue.

Department Position

The Department agrees with U.S. Steel that it incorrectly identified one of the targeted customer codes in the Margin Program. The error has been corrected, and the correct targeted customer's code at issue has been inputted in the Margin Program for the final results.¹⁶³

Comment 4: Exempted Harbor Usage Fees

U.S. Steel's Arguments

- The Department should deduct from Dongbu's U.S. sales a harbor usage fee at Incheon North Harbor during 2011. Pursuant to an agreement between an affiliate of Dongbu and the Government of Korea (GOK),¹⁶⁴ harbor usage fees were waived for Dongbu.¹⁶⁵
- Dongbu addresses various warehousing and handling expenses, but it never accounts for the harbor usage fees¹⁶⁶ and does not deduct these movement expenses from its U.S. sales prices for this review.¹⁶⁷ This is contrary to the Department's established practice -- to deduct such movement expenses from U.S. sales prices, even if the respondent has not been billed for the expenses -- in accordance with section 772(c)(2)(A) of the Act.¹⁶⁸
- The Department should require Dongbu to deduct harbor usage fees from its U.S. sales prices based on the value of the fees per MT of export sales for this review.

Dongbu's Rebuttal Arguments

- There is no basis for deducting these harbor usage fees because they were never actually incurred by Dongbu. The Department should reject the petitioner's argument.
- Neither the petitioner nor the Department raised the issue of the harbor usage fees during the course of the administrative review. The harbor usage fee exemptions cited by

¹⁶³ See Dongbu Final Calculation Memorandum.

¹⁶⁴ See Dongbu's submission of 2011 Dongbu Group Financial Statements on July 17, 2012, at note 31.6.A ("According to this operation agreement, the ownership of these facilities are returned to the government on commencement of operating, and the company have {sic} 50 years of free usage right over the corresponding facilities.").

¹⁶⁵ See Dongbu's supplemental Section D questionnaire response dated July 9, 2012, at Exhibit D-30.

¹⁶⁶ See Dongbu's supplemental Sections A-C questionnaire response dated May 3, 2012, at A-5 and A-6.

¹⁶⁷ See Dongbu's Sections B-D questionnaire response dated January 18, 2012, at Exhibit C-8.

¹⁶⁸ See, e.g., section 777a(c)(2)(A) of the Act; *Sodium Nitrate from Chile: Final Results of Antidumping Duty Administrative Review*, 53 FR 15258 (April 28, 1988) (*Sodium Nitrate from Chile*) at Comment 11 (deducting certain freight expenses from the U.S. sales price for which a respondent had not been billed).

petitioner are contained in a note to the Dongbu Group's financial statements,¹⁶⁹ which indicates that the harbor usage fee exemptions relate to another Dongbu Group company-Dongbu Incheon Port - and not to the harbor fee exemptions that are included as part of Dongbu's miscellaneous income in Exhibit D-30 of Dongbu's July 19, 2012 response.

- The Department previously investigated Dongbu's construction of a port facility in Dangjin (Asan Bay) that Dongbu then deeded to the GOK as per Korean law.¹⁷⁰ As compensation for Dongbu's investment in constructing the port facility at Dangjin, the GOK granted Dongbu free use of the port facilities for a period of 70 years, *i.e.*, it exempted Dongbu Steel from the payment of the harbor usage fees.¹⁷¹ The Department has consistently treated these exemptions from the harbor usage fees as a countervailable subsidy.
- The exemption from the payment of the harbor usage fees at Dangjin benefits all business activities of Dongbu because the port is used for importing (*e.g.*, raw materials) and exporting. The exemptions are not limited to Dongbu's export activities as the petitioner suggests, but to the entire business and do not constitute an actual cost that Dongbu incurred.
- The petitioner's argument that the Department should allocate the amount of these harbor usage fee exemptions, which are reported as part of "miscellaneous income," over Dongbu's total export quantity and deduct that amount from Dongbu's U.S. sales prices of subject merchandise under section 772(c)(2)(A) of the Act is without merit.
- The petitioner's reliance on *Sodium Nitrate from Chile* and claim of Department practice to deduct movement expenses from U.S. sales prices, even if the respondent has not been billed to date for the expenses, is misplaced.¹⁷² In that case, the Department found it irrelevant that these freight expenses had not yet been billed, but instead found the fact that the expenses had actually been incurred as the critical fact as to why they were properly deducted from U.S. price. If anything, *Sodium Nitrate from Chile* reinforces the key requirement that it is only the movement expenses that are incurred that are properly deducted from U.S. price, according to the Department's definition of moving expenses.¹⁷³
- Here, Dongbu did not incur the harbor usage fees because it was exempted from paying them as compensation for constructing the Dangjin port facility, and it is not obligated to pay any such expenses in the future. *Sodium Nitrate from Chile* is inapposite, and the Department should reject the petitioner's argument.
- Treating the waived income as an expense that should be deducted from U.S. price, rather than a waived income amount required to offset a cost not incurred, would amount to

¹⁶⁹ See Dongbu Group Financial Statements at Note 31.6.A, which is contained in Dongbu's section D submission dated July 17, 2012.

¹⁷⁰ See *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review*, 77 FR 58512, 58517 (September 21, 2012).

¹⁷¹ *Id.*

¹⁷² See *Sodium Nitrate From Chile*, at Comment 11, where the Department considers these as incurred expenses, and the fact that they have not been billed to date is irrelevant to these proceedings.

¹⁷³ See the Department's standard market economy section C questionnaire, Page C-18, located at <http://ia.ita.doc.gov/questionnaires/20110816/q-review-sec-c-081611.doc>, where the Department states: "{R}eport the information requested concerning the direct cost incurred to bring the merchandise from the original place of shipment to the customer's place of delivery if included in the price charged your customer."

double counting because these amounts have already been included in the costs reported to the Department (*e.g.*, in the imported material cost).

- Even if the Department were to accept the petitioner's argument, the entire amount in question should not be allocated as a deduction to U.S. price under section 772(c)(2)(A) of the Act. The harbor fee exemptions received by Dongbu are not limited to Dongbu's export sales; they relate to Dongbu's business operations as a whole and pertain to its imported raw materials and other products just as much as to its exports. To deduct this entire amount from U.S. price as a foreign movement expense would greatly overestimate the expenses and, therefore, be unfairly punitive. Treating these port fee exemptions as all relating to exports would be tantamount to a facts available determination because the Department never asked Dongbu any questions about the nature of these harbor usage fees.

Department Position

We agree with Dongbu that there is little information on the record with regard to the harbor usage fees at Incheon North Harbor, the harbor usage fees at issue here.¹⁷⁴ Specifically, as Dongbu stated, "the only details about harbor usage fee exemptions cited by Petitioner are contained in a note to the Dongbu Group's financial statements,"¹⁷⁵ and Dongbu further indicates that "the harbor usage fee exemptions referenced in those Dongbu Group financial statements relate to another Dongbu Group company – Dongbu Incheon Port – and not to the harbor fee exemptions that are included as part of Dongbu Steel's miscellaneous income in Exhibit D-30 of Dongbu Steel's July 19, 2012 response."¹⁷⁶ As the record stands, there is insufficient information for the Department to properly conduct an analysis regarding whether to deduct the harbor usage fees specifically at issue from Dongbu's U.S. sales pursuant to section 772(c)(2)(A) of the Act. Without further information, the Department is unable to discern whether the exempted harbor usage fees specifically at issue are included as part of Dongbu's miscellaneous income in Exhibit D-30 of Dongbu's July 19, 2012, response.

In addition, Dongbu indicated in its case brief that "{t}he exemption from the payment of the harbor usage fees at Dangjin benefits all business activities of Dongbu because the port is used for importing (*e.g.*, raw materials) and exporting. The exemptions are not limited to Dongbu Steel's export activities as Petitioners suggest, but to the entire business . . ." Since the waived harbor cost at issue relates to Dongbu's "imported raw materials and other products just as much as to its exports,"¹⁷⁷ and without sufficient information on the record of how much the exempted harbor usage fees directly related to Dongbu's exports of subject merchandise, the Department is unable to calculate a proper amount of waived harbor usage fees.

¹⁷⁴ Dongbu's Rebuttal Brief on Preliminary Results (November 6, 2012), at 1.

¹⁷⁵ See Dongbu's Rebuttal Brief on Preliminary Results, at 5 (citing Dongbu Group Financial Statements at Note 31.6.A, which is contained in Dongbu's section D submission dated July 17, 2012).

¹⁷⁶ Dongbu's Rebuttal Brief on Preliminary Results, at 2.

¹⁷⁷ Dongbu's Rebuttal Brief on Preliminary Results, at 5.

Accordingly, the Department determined not to deduct the exempted harbor usage fees at issue from Dongbu's U.S. sales prices for these final results.

Comment 5: Date of Sale

Dongbu's Arguments

- The Department inadvertently used date of sale instead of entry date¹⁷⁸ in defining the universe of U.S. sales in the *Preliminary Results*. This resulted in the exclusion of certain sales that were sold before the POR, but that were entered during the POR, from the Department's margin analysis.
- Using date of sale instead of entry date also resulted in truncation of some home market sales that were included as part of the "window period" sales under the Department's 90/60 day rule, because sales stretching 90 days back from the first U.S. sale entered during the POR were not included.
- In the final results, the Department should adjust its margin program so that it captures all U.S. sales that were entered during the POR.

The petitioner did not comment on this issue.

Department Position:

The Department agrees with Dongbu, in part. The Department has adjusted the beginning and ending day in both the comparison market and margin programs to ensure that all Dongbu's U.S. sales that entered during the POR were properly included in the margin program. However, we continue to use Dongbu's reported sale date (SALEDATU) for all Dongbu's sales which were made and entered the United States within the POR in order to assign the appropriate exchange rate, and match U.S. sales and home market sales in contemporaneous months. Accordingly, the beginning day, ending day and window periods have been adjusted for Dongbu in the comparison market and margin programs for the final results.¹⁷⁹

Comment 6: Comparison Market Gross Unit Price Variable

Dongbu's Arguments

- The Department inadvertently used GRSUPRH instead of GRSUPRIH in its margin program in the *Preliminary Results*, which resulted in certain sales failing the cost test on account of currency mismatches. More specifically, the currency for certain domestic local sales as reported in GRSUPRH were not all in Korean won, but were

¹⁷⁸ See Dongbu's January 18, 2012, Section C Response at 1.

¹⁷⁹ See sections "1-E-ii-- U.S. SALES INFORMATION" and "1-B-i: CAPTURING THE FULL UNIVERSE OF U.S. SALES" of the Final Margin Program, and section "1-B: DATE INFORMATION" of the Final Comparison Market Program for details. See also Dongbu Final Calculation Memorandum.

instead in U.S. dollars or Euros. A second field, GRSUPR1H, was added to report all home market sales, including domestic local sales, in Korean won to provide the Department with values of all home market sales in one common currency. Therefore, by using GRSUPRH in the margin program, certain domestic local sales that were invoiced in a currency other than Korean won were compared to costs that were stated in Korean won. This currency mismatch in turn resulted in these domestic local sales failing the cost.

- In the final results, the Department should use GRSUPR1H in its margin program because all values reported in this field have been converted to Korean won and thus serve as the appropriate basis for an accurate comparison.

The petitioner did not comment on this issue.

Department Position:

The Department agrees with Dongbu and confirms that GRSUPR1H should be used in its margin program because all values reported in this field have been converted to one common currency, Korean won, which will most accurately facilitate the cost test because all costs were stated in Korean won. Accordingly, GRSUPR1H has been inputted in the margin program for the final results.¹⁸⁰

II. HYSCO

Comment 7: Date of Sale

U.S. Steel's Arguments

- The Department should use the invoice date for the date of sale, instead of shipment date, as date of sale for HYSCO U.S. sales, as any party that proposes using a date other than invoice date as the date of sale must show that the alternative date better reflects the date on which the material terms of sale are established.
- HYSCO has not demonstrated that any date of sale, other than the invoice date, indicates when the terms of sale were established.
- The material terms of sale for its U.S. sales can and do change after the initial agreement with its customers, and that negotiations regarding quantity and delivery continue after the date of shipment for HYSCO's U.S. sales. Therefore, the terms of sale are not set until the invoice date.
- U.S. Steel claims that there is only one sale for which HYSCO provided evidence showing when HYSCO requested and received its U.S. customer's consent for changes to the material terms of quantity and delivery. However, for this sale, communications between HYSCO and the U.S. customer supports U.S. Steel's contention that the invoice date should be used as the date of sale, because the quantity changed beyond the specified tolerance level after the shipment date.

¹⁸⁰ See *id.*

- The sales documents HYSCO provided for three additional U.S. sales also support the use of the invoice date as the date of sale, because the documentation shows changes to quantity that are beyond the tolerance level agreed upon by the parties. There is no evidence that the changes were agreed upon until the date the invoice was issued by Hyundai HYSCO U.S.A (HHU).
- The invoices issued by HHU constitute the only evidence on the record of HYSCO's U.S. customer being informed of and consenting to the changes in quantity that took place after the initial agreement.
- Using the shipment date as the date of sale wherever it precedes the invoice date – regardless of whether the material terms of sale were, in fact, set on the shipment date – would unlawfully supplant the date of shipment for the date of invoice as the presumptive date of sale. The Department's regulations at 19 CFR 351.401(i) presume invoice date as date of sale, not shipment date as date of sale.
- Any assumption that the material terms of sale are fixed upon the date of shipment has no basis in reality or common sense because the Department has previously stated that the "date of shipment rarely represents the date on which the material terms of sale are established." Instead, the invoice date reflects real-life commercial practices, and the evidence in this case is proof that the material terms of sale can and do change after shipment.
- Using the shipment date as the date of sale whenever it precedes the invoice date is inconsistent with the Department's normal practice. In cases where the material terms of sale are established after the shipment date, the Department has consistently determined that the date of sale is also after the shipment date.
- By creating a presumption in favor of the shipment date instead of invoice date as the date of sale would contradict Congress' intent as expressed in the SAA

HYSCO's Arguments

- The Department correctly used the earlier of date of shipment or date of invoice as the date of sale for HYSCO's U.S. Sales, and that the documents on the record indicate that the material terms of sale for HYSCO's sales to the U.S. are fixed on the date of shipment.
- While HHU may continue to negotiate price and quantity after the time of the order, price and quantity are fixed at the time of shipment from HYSCO's factory.
- In HYSCO's normal course of business, changes in quantity in excess of tolerance must be approved by the customer prior to shipment, and generally takes place during a telephone discussion. HYSCO states that they do not alter the quantity of the order on the original order sheet, nor do they create a new order sheet. Instead, the authorization is generally recorded by HYSCO in HYSCO's system by changing the allowable quantity tolerance.
- To the extent that U.S. Steel cites certain documentation on the record to claim that changes to quantity may occur after the date of shipment, U.S. Steel mischaracterizes these documents. Specifically, the documentation U.S. Steel relies on actually shows that HYSCO confirmed with their customer the fulfillment of the order as well as permission to ship a quantity outside the permissible tolerance for the order before it

actually shipped the merchandise. Authorization for the change was recorded by altering the permitted quantity tolerance on HYSCO's internal order sheets. There is no evidence supporting U.S. Steel's contention that the customer did not know of and approve the change in quantity prior to shipment. Instead, the record evidence shows that if HYSCO it intends to ship merchandise that is above or below the allowable quantity tolerance, it will seek the customer's consent prior to shipment.

- With regard to the three other instances U.S. Steel points to in which the invoice constitutes the only evidence of the customer being informed of and consenting to the changes in quantity, reviewing the documentation confirms that the shipped quantities were, in fact, within the tolerances specified in the relevant sales orders. U.S. Steel is incorrectly relying on purchase orders for the agreed upon quantity, not HYSCO's order confirmation. A customer's purchase order is a request from a customer but is not binding until accepted or countered by HYSCO. The sales in question were all delivered within the allowed tolerance, and it makes no business sense for either HYSCO or its customers for HSYCO to make shipments of merchandise in which the customer does not know the quantity until receipt of the merchandise.
- The Department has an established practice of relying on findings made in prior segments of a particular proceeding, and is dissuaded by the Courts from altering its methodology once established. The Department has consistently determined in every prior review of this case and in every other case in which HYSCO has participated that HYSCO's date of shipment is the appropriate date of sale, and the Department has fully evaluated this issue in prior reviews. Because the facts regarding HYSCO's U.S. sales process have not changed in the instant review, the Department should accept the date of shipment as the date of sale.
- The Department's practice, which is supported by other cases, is to use the shipment date as the date of sale when the shipment date precedes the invoice date as it is the date that best reflects that date on which the material terms of sale were established. In addition, the Department has frequently adjusted the reported date of sale from invoice date to date of shipment when the shipment date preceded the invoice date. The Department has also found in numerous cases that the date of shipment is the appropriate date of sale despite arguments that terms of sale may, or did change after the shipment date but prior to the issuance of the commercial invoice.
- The case that U.S. Steel cites supporting the position that material terms of sale can change after the date of shipment are specific to that case, and distinguishable from the instant case.
- The Department should continue to use the date of shipment as the date of sale for HYSCO's U.S. sales.

Department Position

The Department agrees with HYSCO that the correct date of sale is the date of shipment. Pursuant to 19 CFR 351.401(i), the Department "normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business."¹⁸¹

¹⁸¹ See 19 CFR 351.401(i).

However, that regulation also contains an express caveat that “the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.”¹⁸² One such situation involves the Department’s long-standing practice of using, where the shipment date precedes the invoice date, shipment date as the date of sale.¹⁸³ The rationale for the Department’s normal practice of *not* considering dates subsequent to the date of shipment as the date of sale is that “when a party ships its product to a customer, it is reasonable to assume that the material terms of the sale have been established.”¹⁸⁴ The Department’s practice of using the shipment date when that date is before invoice date as the date of sale has been “implicitly approved by the courts.”¹⁸⁵ The Department has adhered to that practice in prior administrative reviews of the CORE dumping order in determining the date of sale for HYSCO’s U.S. sales to correspond to the date of shipment.¹⁸⁶ In the present administrative review, the Department finds no reason to depart from its normal practice *not* to consider dates subsequent to the date of shipment from the factory as appropriate for date of sale because once merchandise is shipped the material terms of sale are presumed to be established.¹⁸⁷ Although HYSCO reported that negotiations for sales to U.S. customers could continue until actual shipment,¹⁸⁸ HYSCO provided additional documentation showing that quantity, within a certain tolerance, was agreed upon when HYSCO extended an offer through Hyundai HYSCO USA, Inc., and was ultimately shipped to the customer in the United States in quantities within those agreed-upon tolerances.¹⁸⁹ Therefore, record evidence indicates that the material terms of sale with respect to quantity were established at the time of shipment.

¹⁸² See *id.*; see also *Allied Tube and Conduit Corp. v. United States*, 24 C.I.T. 1357, 1370-71 (2000).

¹⁸³ See, e.g., *Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027 (March 23, 2012) and accompanying Issues and Decision Memorandum at Comment 1; *Certain Welded Carbon Steel Standard Pipes and Tubes from India: Final Results of Antidumping Duty Administrative Review*, 75 FR 69626 (November 15, 2010) and accompanying Issues and Decision Memorandum at Comment 1; *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 73 FR 75398 (December 11, 2008) and accompanying Issues and Decision Memorandum at Comment 2; *Notice of Final Determination of Sales at Less than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 76918 (December 23, 2004) and accompanying Issues and Decision Memorandum, at Comment 10.

¹⁸⁴ See *Mittal Steel Point Lisas Ltd. v. United States*, 31 C.I.T. 638, 647 (Ct. Int’l Trade 2007) (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 64 FR 38756, 38768 (July 19, 1999) (*Steel Products from Brazil*)).

¹⁸⁵ See *Mittal Steel*, 31 C.I.T. at 647 (citing *AIMCOR v. United States*, 141 F.3d 1098, 1104-05 (Fed. Cir. 1998)).

¹⁸⁶ See, e.g., *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the 2009-2010 Administrative Review and Revocation, in Part*, 77 FR 14501 (March 12, 2012) and accompanying Issues and Decision Memorandum, at Comment 4; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Administrative Review*, 75 FR 13490 (March 22, 2010) and accompanying Issues and Decision Memorandum, at Comment 5; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Administrative Review and partial Rescission*, 74 FR 11082 (March 16, 2009) and accompanying Issues and Decision Memorandum, at Comment 18.

¹⁸⁷ See *Steel Products From Brazil*, 64 FR at 38768, and accompanying Issues and Decision Memorandum, at Comment 5.

¹⁸⁸ See HYSCO’s December 20, 2011, Questionnaire Response at A-23.

¹⁸⁹ See *id.* at Exhibit 10; HYSCO’s response to the Department’s March 15, 2012, Supplemental Sections A-C Questionnaire (HYSCO’s SQR) at page 27 and Exhibit S-29.

With regard to price, HYSCO has stated that HHU will negotiate the terms of sale until shipment.¹⁹⁰ Record evidence does not establish that terms changed after shipment, and in fact indicates that price remained stable after the date of shipment. For instance, the transfer price from HYSCO to HYSCO USA did not vary from the offer to the commercial invoice, which was issued on the shipment date.¹⁹¹ Thus, the Department finds that, consistent with its practice, it is appropriate to use shipment date as the date of sale for HYSCO's U.S. sales for these final results.

Comment 8: Warranty Expenses

U.S. Steel's Arguments

- HYSCO reported warranty expenses for sales in the home market on a transaction-specific basis.
- The Department's practice is to allocate a respondent's warranty expenses incurred in the home market over the total sales in the home market, unless there is evidence that the respondent only extends its warranty to certain products, customers, or types of transactions.¹⁹²
- A respondent does not expect to recoup its warranty expenses on a transaction-specific basis, but instead expects to recoup the expenses from all of its sales. Therefore, it is distortive to calculate and deduct warranty expenses on a transaction-specific basis.
- The Department has re-allocated warranty expenses that were reported by a respondent on a transaction-specific basis over the respondent's total sales in previous administrative reviews of CORE from Korea with respect to POSCO.¹⁹³

HYSCO's Arguments

- HYSCO reported their home market warranty expenses (WARRH) on a transaction-specific basis because they negotiate warranty adjustments on a case-by-case basis.

¹⁹⁰ See HYSCO's December 20, 2011, Questionnaire Response at A-23.

¹⁹¹ See *id.* at Exhibit 10; HYSCO's SQR at Exhibit S-29.

¹⁹² See *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Administrative Review and Partial Rescission*, 74 FR 11082 (March 16, 2009) (*CORE 14*) and accompanying Issues and Decision Memorandum, at Comment 13; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Sixteenth Administrative Review*, 76 FR 15291 (March 21, 2011) and accompanying Issues and Decision Memorandum, at Comment 9; *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 accompanying Issues and Decision Memorandum, at Comment 4; *Certain Welded Carbon Steel Standard Pipes and Tubes from India: Final Results of Antidumping Duty Administrative Review*, 75 FR 69626 (November 15, 2010) and accompanying Issues and Decision Memorandum, at Comment 4.

¹⁹³ See *CORE 14* and accompanying Issues and Decision Memorandum at Comment 13; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Sixteenth Administrative Review*, 76 FR 15291 (March 21, 2011) (*CORE 16*) and accompanying Issues and Decision Memorandum, at Comment 9.

- The Department's instructions required HYSCO to report the warranty expenses on as specific a basis as possible, and where companies can report warranty expenses on a transaction-specific basis, the Department will accept the reporting methodology.¹⁹⁴
- Most warranty claims involve damage to the merchandise during transportation, rather than errors in the manufacturing process.
- HYSCO negotiates a price adjustment with their customers for each specific coil on a case-by-case basis to compensate for any defects.
- Warranty claims are rare in HYSCO's normal business operations, and transaction-specific warranty reporting is not distortive.
- U.S. Steel has previously argued against reallocating the respondent's transaction-specific warranty expenses to all U.S. sales, instead supporting transaction-specific warranty expenses.
- Reallocating the warranty expenses over all home market sales would result in an adjustment so small it would classify as a *de minimis* adjustment that the Department should disregard.
- It would be distortive to allocate warranty expenses over all home market sales in the instant case.

Department Position

The Department agrees with U.S. Steel that warranty expenses should not be allocated on a transaction-specific basis. In accordance with our practice, we have allocated warranty expenses over all of HYSCO's home market sales.¹⁹⁵ We recognize that the nature of a warranty expense is that it is unknown and unforeseeable at the time of sale. Unforeseeable expenses, including specific post-POR warranty claims, are irrelevant in the price setting of specific POR sales. Instead, sellers would normally build in a warranty and bad debt allowance across products, markets or customers based on a company's historical experience.¹⁹⁶ Where a company has a warranty policy that it applies to all products and all sales our practice is to allocate warranty expenses over all sales. In circumstances where the warranty policy is limited to certain products, customers, or types of transactions, we may consider a narrower allocation.¹⁹⁷ The Department instructed HYSCO to report its warranty expenses based upon their experience by model, and provide a copy of each type of warranty

¹⁹⁴ *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Taiwan*, 64 FR 30592, 30612 (June 8, 1999).

¹⁹⁵ See *CORE 14* and accompanying Issues and Decision Memorandum at Comment 13; see also, e.g., *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008) and accompanying Issues and Decision Memorandum at Comments 59 and 69 (where we stated that "consistent with the Department's practice, we have utilized all expenses incurred during the period of investigation and allocated such across all period of investigation sales using a value-based allocation methodology"); *Steel Wire Garment Hangers From the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the First Antidumping Duty Administrative Review*, 75 FR 68758 (November 9, 2010).

¹⁹⁶ See *Honey from Argentina: Final Results, Partial Rescission of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 71 FR 26333 (May 4, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

¹⁹⁷ See *CORE 14* and accompanying Issues and Decision Memorandum at Comment 13.

agreement.¹⁹⁸ HYSCO reported the warranty expenses on a transaction basis, and stated that “HYSCO does not maintain warranty agreements with its customers in the home or U.S. markets.”¹⁹⁹ There is no information on the record to suggest that HYSCO’s warranty program was limited to certain products, customers or types of transactions.²⁰⁰ Thus, consistent with *CORE 14*, it is appropriate to allocate HYSCO’s warranty expenses over all sales.

Comment 9: Reclassification of Merchandise

U.S. Steel’s Arguments

- The Department should reclassify as non-prime merchandise certain sales in the home market that have certain warranty expenses.²⁰¹
- The Department’s practice is to treat damaged merchandise as non-prime,²⁰² and that the sales in question qualify as damaged, and that HYSCO categorized products as non-prime for the same type of reasons that the warranty expenses are incurred.
- There is no difference when the defects occurred, only when the defects were discovered, *i.e.*, during the production process or upon or shortly after delivery.²⁰³

HYSCO’s Arguments

- The Department should not reclassify merchandise with a high warranty expense as non-prime merchandise.
- At the time of sale, HYSCO classified the merchandise as prime when it satisfied a recognized industry specification, and that non-prime merchandise did not meet any industry specifications.²⁰⁴
- U.S. Steel cannot point to record evidence to support the conclusion that merchandise HYSCO sold was defective, damaged, or non-prime at the time of sale.

Department Position

The Department agrees with HYSCO. Although U.S. Steel is correct that the Department has treated damaged merchandise as non-prime, in the cases U.S. Steel cites, either there were partial returns of the merchandise with warranty expense claims, or the Department

¹⁹⁸ See HYSCO’s January 13, 2013, Questionnaire Response at page B – 37.

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See US Steel’s Proprietary Case Brief at 14.

²⁰² See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 FR 49622 (September 28, 2001) (*Carbon Steel Flat Products from Thailand*) and accompanying Issues and Decision Memorandum, at Comment 13 (reclassifying all of the respondent’s sales with warranty expenses as non-prime because such sales involved defective merchandise); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil*, 65 FR 5554, 5570 (February 4, 2000) (*Flat-Rolled Carbon-Quality Steel Products from Brazil*) (same).

²⁰³ See HYSCO’s January 13, 2013, Questionnaire Response at page B – 9.

²⁰⁴ See *id.*

found that the merchandise was re-classified as scrap, or the description of the merchandise was clearly non-prime.²⁰⁵ HYSCO reports that at the time of sale, the merchandise in question was not found to be defective or damaged.²⁰⁶ Rather, HYSCO reported that any characteristics that would render the merchandise other than prime merchandise was found after HYSCO's customer had begun production.²⁰⁷ In the documentation HYSCO provided to the Department there is no indication that the merchandise was intentionally sold as prime merchandise, when it should have been classified other than prime merchandise, nor did HYSCO re-classify the merchandise at any time.²⁰⁸ Therefore, we will continue to treat these sales as sales of prime merchandise.

Comment 10: Classification of Non-Temper Merchandise

U.S. Steel's Arguments

- The Department should exclude HYSCO's home market sales of non-temper rolled merchandise from the dumping duty calculation because, U.S. Steel claims, they are sold outside the ordinary course of trade.
- These sales involve an unusual production process, sales process, number of customers, quantity per sale, and profit margin.²⁰⁹
- HYSCO does not mention non-temper rolling in its production brochures, product codes, invoices, production records, or accounting records, and does not provide documentation to its customers to show that the merchandise has not been temper rolled.²¹⁰
- Inclusion of non-temper rolled merchandise in the margin calculations leads to irrational and unrepresentative results.
- The Department's practice is to exclude any home market sales from the margin calculation where those sales are shown to be sold outside the ordinary course of trade.²¹¹
- The Department's practice is to examine the "totality of the circumstances" instead of one factor in isolation to determine whether home market sales are outside the ordinary course of trade.²¹² In prior cases, the Department has analyzed: 1. Whether there are any unusual physical characteristics or product specifications; 2. Whether there is anything unusual in the production process of sales process; 3. The comparative volume of total sales; 4. The comparative average quantity of individual sales; 5. The

²⁰⁵ See *Carbon Steel Flat Products from Thailand; Flat-Rolled Carbon-Quality Steel Products from Brazil*.

²⁰⁶ See HYSCO's responses to the Department's July 2, 2012, Supplemental Sections A-C Questionnaire, dated August 7, 2012 (HYSCO SQR2), at pages 13 – 14.

²⁰⁷ See HYSCO SQR2, at pages 13 – 14, exhibit 16.

²⁰⁸ See HYSCO SQR at exhibit S-19; HYSCO SQR2 at exhibit 16.

²⁰⁹ See U.S. Steel Case Brief at 19.

²¹⁰ See *id.*

²¹¹ See 19 CFR 351.102(a)(35) (2011); *Koyo Seiko Co. v. United States*, 186 F. Supp. 2d 1332, 1348 (Ct. Int'l Trade 2002) (*Koyo Seiko*); *Monsanto Co. v. United States*, 698 F. Supp. 275, 278 (Ct. Int'l Trade 1988) (*Monsanto*); *Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Final Results of Antidumping Duty Administrative Review*, 65 FR 8935, 8939 (February 23, 2000) (*Corrosion-Resistant from Japan*); *Certain Cold-Rolled and Corrosion Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 64 FR 12927, 12941-12942 (March 16, 1999) (*Cold-Rolled and Corrosion-Resistant from Korea*).

²¹² *Koyo Seiko*, 186 F. Supp. 2d at 186 (quoting *Monsanto*, 698 F. Supp. at 278 (internal quotation omitted)).

comparative number of customers; and 6. Differences in cost of production, price and profitability.²¹³

- An analysis of each of these factors demonstrates HYSCO's sales of non-temper rolled merchandise are outside the ordinary course of trade. Specifically, HYSCO's home market sales of non-tempered merchandise have unusual physical characteristics, an unusual production process, sales process, number of customers, average quantity per sale, and profit margins.²¹⁴
- While HYSCO has contended that merchandise with the non-temper rolled characteristic cannot be outside the ordinary course of trade because the non-temper rolled characteristic is included in the Department's model match hierarchy,²¹⁵ this is no impediment to finding that the merchandise is outside the ordinary course of trade for HYSCO. This is because the standard for assessing this is whether the sales in question "have characteristics that are not ordinary *as compared to sales or transactions made generally in the same market.*"²¹⁶ Here, there is no question that HYSCO's sales of non-temper rolled merchandise are unusual in numerous respects. This argument was also addressed and rejected by the Department in another case.²¹⁷ The Department's treatment of HYSCO's home non-temper rolled sales in *CORE 17 AR* as within the ordinary course of trade provides no basis to treat HYSCO's sales of non-temper rolled merchandise as anything but extraordinary,²¹⁸ because the Department's treatment of HYSCO's non-temper rolled home market sales in that review was not in accordance with law or supported by substantial evidence.

HYSCO's Arguments

- The Department should continue to accept HYSCO's treatment of non-temper rolled merchandise.
- Temper rolling is specifically identified in the model match criteria, and has consistently included this characteristic in every segment of this case, as well as in other cases, and that the Department has previously rejected U.S. Steel's argument that non-temper rolled merchandise should be disregarded in the previous review of the instant case.²¹⁹

²¹³ See *Bergerac v. United States*, 102 Supp. 2d 497, 508-510 (Ct. Int'l Trade 2000); *Certain Steel Concrete Reinforcing Bars From Turkey: Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part*, 73 FR 66218 (November 7, 2008) and accompanying Issues and Decision Memorandum at Comment 1; *Corrosion-Resistant from Japan* and accompanying Issues and Decision Memorandum at Comment 2; *Cold-Rolled and Corrosion-Resistant from Korea*, 64 FR at 12941-12942; *Certain Cut to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 77614, 77616 (December 19, 2008).

²¹⁴ See US Steel's Case Brief at pages 22 – 25.

²¹⁵ See *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the 2009-2010 Administrative Review and Revocation, in Part*, 77 FR 14501 (March 12, 2012)(*CORE 17 AR*) and accompanying Issues and Decision Memorandum, at Comment 3.

²¹⁶ SAA at 834; reprinted in 1994 U.S.C.C.A.N. 4040, 4171 (emphasis added).

²¹⁷ *Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review*, 62 FR 17148, 17151 (April 9, 1997) and accompanying Issues and Decision Memorandum, at Comment 2.

²¹⁸ See *CORE 17* and accompanying Issues and Decision Memorandum, at Comment 3.

²¹⁹ See *Id.*

- The Department has previously found and verified that HYSCO appropriately reported temper and non-temper rolled products and that there was no reason to classify non-temper rolled products outside the ordinary course of trade.²²⁰
- The factors that U.S. Steel points to supporting the finding that non-temper rolled merchandise is outside the ordinary course of trade are not unique to non-temper rolled merchandise, but reflect normal circumstances and variances in HYSCO's home market.²²¹
- Non-temper rolled products are not the result of an unusual production process, rather, that temper or non-temper rolled involves raising or lowering rollers only as the product passes on the production line.²²²
- The Department has recognized that company may not account for all of the Department's products characteristics in their normal accounting records or that there may be no appreciable cost differences associated with product characteristics.²²³
- U.S. Steel's analysis of sales of non-tempered merchandise is distortive.
- Non-tempered merchandise home market sales were significant, and that the Department has long held that a small quantity of sales does not render such sales outside the ordinary course of trade.²²⁴
- The number of customers for non-temper rolled merchandise is significant, that the customers also purchased tempered-rolled merchandise, and that the non-temper rolled merchandise sales took place throughout the POR.²²⁵ The non-temper rolled merchandise is sold in similar quantities as temper-rolled merchandise. HYSCO argues that U.S. Steel's profit calculations for non-tempered merchandise are meaningless.²²⁶

Department Position

The Department agrees with HYSCO. In the questionnaire, the Department required HYSCO to report all its home market sales as either 'temper rolled' or 'non-temper rolled.'²²⁷ HYSCO provided documentation for an order of non-temper rolled merchandise.²²⁸ HYSCO reported that their normal cost accounting system does not account for differences in temper rolling or yield strength, and that they believe that the incremental cost associated with this process is minimal.²²⁹

²²⁰ See *id.*

²²¹ See HYSCO's Rebuttal Brief at 36.

²²² See *id.*; HYSCO's Section A Response, dated December 20, 2011, at Exhibit A – 17.

²²³ See *Sodium Metal from France: Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances*, 73 FR 62252 (October 20, 2008) and accompanying Issues and Decision Memorandum at Comment 1.

²²⁴ See HYSCO's Rebuttal Brief at 38 – 41.

²²⁵ See HYSCO's Rebuttal Brief at 42 – 43.

²²⁶ See *id.* at 43.

²²⁷ See HYSCO's Response to Section B – D of the Department's October 26, 2011 Questionnaire, dated January 13, 2012 (HYSCO's QRB-D) at B – 17.

²²⁸ See HYSCO's Response to the Department's March 15, 2011, Section A – C Supplemental Questionnaire, dated April 23, 2012 (HYSCO's SQRA-C) at pages 14 and 15, and Exhibit S – 9B.

²²⁹ See HYSCO's QRB-D at D – 28.

The Department previously verified, and found that HYSCO has appropriately reported temper and non-temper rolled products.²³⁰ Consistent with *CORE 16*, the Department finds that HYSCO has appropriately reported the production and sales of temper and non-temper rolled products. There is no evidence on the record that changes have been made to an order from the time the order was entered into HYSCO's order system to the time of invoice.²³¹ Further, HYSCO provided documentation showing sales of non-tempered merchandise in the home market.²³² Thus, the Department finds that HYSCO has both produced and sold non-tempered merchandise in the home market during the POR.

The Department further finds that HYSCO's sales of non-tempered merchandise in the home market are not outside the ordinary course of trade. The Department's regulations at 19 CFR 351.102(b)(35) states 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.

In *NSK Ltd.*, the Court explained that “the party requesting a price adjustment bears the evidentiary burden ‘of proving whether sales used in Commerce’s calculations are outside the ordinary course of trade . . .’ ”²³³ The Court also stated that “absent adequate evidence to the contrary, Commerce will treat sales as within the ordinary course of trade.”²³⁴

Here, we find that the petitioner did not provide sufficient evidence lending credence to its argument that the sales in question possess characteristics that are “extraordinary” for the home market as described in 19 CFR 351.102(b)(35). Specifically, the petitioner argues that the sales in question are not representative of the market under consideration because home market sales of non-tempered merchandise have an unusual production process, sales process, number of customers, average quantity per sale and profit margins. As discussed *supra*, the Department has previously found, and verified that HYSCO has appropriately reported temper and non-temper rolled products, and did not have reason to find that the production of non-tempered rolled products is outside the ordinary course of trade. The Department finds that temper-rolling is only one of several options available on the

²³⁰ See *CORE 16* and accompanying Issues and Decision Memorandum at Comment 5.

²³¹ See HYSCO's QRA at Exhibit A – 9.

²³² See HYSCO's SQRA-C at Exhibit S – 14.

²³³ See *NSK Ltd. v. United States*, 416 F. Supp. 2d 1334, 1343 (CIT 2006), Citing *Nachi-Fujikoshi Corp. v. United States*, 798 F. Supp. 716, 718 (CIT 1992).

²³⁴ See *id.*, where the Court cites *Torrington Co. v. United States*, 127 F.3d 1077, 1081 (CAFC 1997).

production line.²³⁵ Based on a review of the data, the Department agrees with HYSCO's analysis that the number of customers that purchase non-temper rolled merchandise is significant, and that none of those customers were otherwise unique in their purchases of home market sales of subject merchandise from HYSCO.²³⁶ Likewise, the average purchase quantities for non-temper rolled merchandise do not suggest that they were being sold in quantities that are unusual.²³⁷ Finally, there is no information on the record that would suggest that HYSCO's sales of non-tempered rolled merchandise were made through different channels of distribution, to different customer categories, or with different terms of sale than sales of temper rolled merchandise.

The Department agrees with HYSCO that U.S. Steel's interpretation of the profit rates are indicative of products sold outside the ordinary course of trade.²³⁸ We would expect a larger difference in the profit rate between ordinary and not-ordinary course of trade goods, *i.e.*, special orders have a high profit rate, non-prime have a low profit rate. The Department agrees with HYSCO that there is a large range of products making up the total home market sales which U.S. Steel has not considered. This large range of products include multiple differences, *e.g.*, CTYPE, ROLL, CPROCES, CMETAL, CQUAL, CSTREN, CWEIGHT, CTHICK, CWIDTH, CFORM, CTEMPER, and CLEVEL, all matching criteria the Department takes into consideration in our calculations.²³⁹ Thus, U.S. Steel's arguments are unpersuasive.

For these reasons, the Department determines not to consider non-temper rolled sales as outside the ordinary course of trade.

III. Union

Comment 11: Individual Review

Union's Arguments

- The Act expresses a clear preference for the Department to review and calculate individual weighted average dumping margins for all known producers and exports unless there is a large number of exporters and producers.²⁴⁰
- The Department incorrectly limited the number of producers or exporters to review.²⁴¹
- The Department failed to explain why the number of companies which had more than *de minimis* shipments during the period of review was large, or to demonstrate that the two respondents selected by the Department account for the largest volume of the subject merchandise that can reasonably be examined in this review.²⁴²

²³⁵ See HYSCO's QRA at Exhibit A – 16 and Exhibit A – 17.

²³⁶ See HYSCO's Rebuttal Brief at 42.

²³⁷ See *id.*

²³⁸ See HYSCO's Rebuttal Brief at 43; U.S. Steel's Case Brief at Attachment 3.

²³⁹ See HYSCO's QRB-D at B 10 – 18.

²⁴⁰ See Section 777A(c)(1) and (c)(2) of the Act.

²⁴¹ See Union's Case Brief at 3.

²⁴² See *id.* at 4 – 5.

- Union’s volume of imports does not justify not being selected as a respondent.²⁴³
- The Department has resources to devote to Union in this review because the Department will continue a review, if all parties withdraw their requests for review more than 90 days from the publication of the initiation, even if all parties agree to withdrawal.²⁴⁴
- The Department was required to review Union as a voluntary respondent because the CIT has found that workload and resource constraints are not a justifiable reason not to accept a voluntary respondent.²⁴⁵ Here, there was only one potential voluntary respondent, Union.

U.S. Steel’s Comments

- The Department adhered to its legal obligations when it decided to limit its review to two respondents – Dongbu and HYSCO.
- The Act allows for limiting of mandatory respondents in reviews.²⁴⁶
- The CIT has found that neither two nor four is a large number of respondents.²⁴⁷
- The Department has met its statutory and CIT requirements in the instant case.²⁴⁸
- Union’s reliance on *Carpenter Tech* is misplaced because in that case, the Department first limited the number of companies for review due to resource constraints rather than first determining whether there were a large number of producers or exporters.²⁴⁹ Here, the Department did not implicitly find in this case that any number larger than two was “large,” but instead first determined that eight was a large number of respondents. Only after this precondition was met did the Department determine that it would review two respondents, HYSCO and Dongbu.
- The total volume of imports covered by the companies reviewed in this proceeding is appropriate.²⁵⁰
- The Department’s position that it will complete a review if parties withdraw after the 90 day deadline is to ensure that parties will begin submitting their withdrawals prior to the 90 day deadline.²⁵¹
- The Department properly determined not to review Union as a voluntary respondent because the Department has no obligation to review voluntary respondents if the number of voluntary respondents is “so large that individual examination of such {respondents} would be unduly burdensome and inhibit the timely completion of the investigation.”²⁵²

²⁴³ See *id.* at 5.

²⁴⁴ See *id.* at 6.

²⁴⁵ See *Grobest & I-Mei Industrial Vietnam Co. v. United States*, CIT 10-00238 (July 31, 2012).

²⁴⁶ See Section 777A(c)(1) and (c)(2) of the Act.

²⁴⁷ See *Carpenter Tech. Corp. v. United States*, 662 F. Supp. 2d 1337, 1341-44 (CIT 2009) (*Carpenter Tech*) (holding that the Department violated 19 U.S.C. § 1677f-1(c)(2) by failing to consider whether the number of respondents at issue was “large” before determining, based on its workload and available resources, that it would limit the number of respondents it reviewed); *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 637 F. Supp. 2d 1260, 1263-65 (CIT 2009) (*Zhejiang*).

²⁴⁸ See Union’s Rebuttal Case Brief at 3.

²⁴⁹ See US Steel’s Rebuttal Brief at 5.

²⁵⁰ See *id.* at 6.

²⁵¹ See *id.* at 7.

²⁵² 19 U.S.C. § 1677m(a) (2011).

The CIT has recognized the Department has considerable discretion in exercising its authority under the Act.²⁵³

- Here, the Department properly exercised that discretion in finding that reviewing Union would be unduly burdensome, pointing to several resource constraints.
- Union’s reliance on the CIT case *Grobest & I-Mei Indus. Vietnam Co. v. United States* to argue that the Department acted contrary to law in not selecting Union as a voluntary respondent is misplaced, because in that case the CIT found that the Department’s decision set the bar for undue burden too low as it would not allow for individual review of voluntary respondents in any case, making the statutory provision meaningless.²⁵⁴ In the present review, the Department has put forth a number of facts that distinguish this case from the “paradigmatic review.” Significantly, this review represents one of the first reviews in which the Department is applying the *Final Modification for Reviews*.

Nucor’s Comments

- The Department properly limited its examination of producers and exporters and selected a reasonable number of such producers and exporters for individual review. The Act grants the Department broad discretion to limit its review to a reasonable number of respondents. Here, reviews were requested for eight respondents. The Department noted that it received requests to review a large number of producers/exporters, and it properly determined that this is a “large” number. Union’s reliance on the CIT cases *Carpenter Tech* and *Zhejiang* is misplaced since these cases did not hold that eight respondents could not be considered a “large” number. After making a determination that the number is “large,” the Department is afforded significant discretion in limiting the number of mandatory respondents individually reviewed. Here, the Department was warranted in limiting its review to Dongbu and HYSCO, the two largest producers.
- On the question of whether to examine Union as a voluntary respondent, the *Grobest* case does not prevent the Department from declining to review a single voluntary respondent “{w}hen Commerce can show that the burden of reviewing a voluntary respondent would exceed that presented in the typical antidumping or countervailing duty review,”²⁵⁵ and that Court found the Department’s interpretation rendering “every voluntary respondent request subject to an undue burden and timely completion analysis” is reasonable.²⁵⁶ Here, the Department was faced with a heavy caseload and implementation of the *Final Modification for Reviews*, and under these unique circumstances would have created an undue burden and compromised timely completion of this administrative review.

Department Position

With respect to the Department’s decision not to select Union for individual examination,²⁵⁷ section 777A(c)(2) of the Act provides that when we are faced with a large number of

²⁵³ *Longkou Haimeng Mach. Co., Ltd. v. United States*, 581 F. Supp. 2d 1344, 1353 (CIT 2008).

²⁵⁴ *Grobest & I-Mei Indus. Vietnam Co. v. United States*, 853 F. Supp. 2d at 1364.

²⁵⁵ See *Grobest & I-Mei Industrial (Vietnam) Co., Ltd.*, Ct. No. 10-00238, Slip Op. at 25.

²⁵⁶ See *id.* at 21.

²⁵⁷ On October 28, 2011, Union Steel (Union) filed a letter to the Department requesting to be a third mandatory

companies such that its individual examination of all companies would be impracticable, we may limit our individual examination of companies to a reasonable number of such companies. In addition, section 777A(c)(2) of the Act permits us to determine margins for a reasonable number of exporters by limiting our examination either (1) through a sampling of exporters, producers, or types of products or (2) by selecting the exporters accounting for the largest volume of the subject merchandise.

In selecting respondents for individual examination, we took into consideration the number of companies for which a request for review was received by the Department, as well as resources such as current and anticipated workload, and deadlines expected to coincide with the segment in question.²⁵⁸ In the Respondent Selection Memo, we explained that it would not be practicable in this review to examine all eight companies for which we had requests for review in light of, *inter alia*, our limited resources. Thus, in accordance with section 777A(c)(2) of the Act, we selected a reasonable number of respondents, specifically HYSCO and Dongbu, the two respondents accounting for the largest volume of exports of subject merchandise that could reasonably be reviewed.²⁵⁹

In administrative reviews, we issue questionnaires requesting parties to provide detailed information on a wide range of matters that are essential to the calculation of an accurate dumping margin such as corporate structure and ownership, sales practices, home market and U.S. sales prices and adjustments thereto, packing, transportation and other movement-related expenses, and production data for subject merchandise. We carefully analyze initial information we receive in response to questionnaires and we issue follow-up questionnaires to clarify points or obtain further information. We analyze such supplemental responses in order to allow time for any further questions or to prepare for verification. Thus, contrary to Union's claim, there is substantial work involved in selecting an additional company for individual examination.

With respect to the issue of accepting Union as a voluntary respondent, section 782(a)(2) of the Act provides that where the Department has "limited the number of exporters or producers examined," the Department "shall establish . . . an individual weighted average dumping margin for any exporter . . . not initially selected for individual examination . . . if . . . the number of exporters . . . who have submitted such information is not so large that individual examination of such exporters . . . would be unduly burdensome and inhibit the timely completion of" this review. In the Respondent Selection Memo, the Department limited selection of respondents pursuant to section 777A(c)(2) of the Act after considering the number of companies involved and the Department's limited resources.

respondent. In addition to the two companies selected as mandatory respondents, on October 28, 2011, Union requested to be considered as a voluntary respondent.

²⁵⁸ See Memorandum to Melissa Skinner, Director, Office 3, from Christopher Hargett, Senior International Trade Compliance Analyst, entitled "18th Antidumping Duty Administrative Review of Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Selection of Respondents for Individual Review," dated October 26, 2011 (Respondent Selection Memo).

²⁵⁹ See Respondent Selection Memo.

On November 22, 2011, Union submitted a letter requesting the Department to reconsider Union as a mandatory respondent for this review. Union requested the Department to reconsider its October 26, 2011, decision to only selecting two producers/exporters and to examine its analysis outlining the reasons why Union should be considered as the third mandatory respondent. On January 3, 2012, Union timely submitted a voluntary response to section A of the Department's antidumping duty questionnaire. On January 23, 2012, and January 27, 2012, Union voluntarily and timely submitted its sections B-D responses to the Department's questionnaires. On November 22, 2011, Union again submitted a request for the Department to reconsider its decision to not select it as a mandatory respondent in this review, or, alternatively, to examine its voluntary responses for the Department's preliminary results. Further, on April 10, 2012, counsel for Union meet with Department officials to again present their case and urged the Department to examine its questionnaire responses.

As explained in the Voluntary Respondent Memo, during this administrative review, we did not have time and resources to accept Union as a voluntary respondent.²⁶⁰ As detailed below, even without selecting Union for individual examination or accepting Union as a voluntary respondent, the complexity of the issues and the work involved with reviewing two companies required us to extend the due date for the preliminary results from May 2, 2012, to August 30, 2012.²⁶¹ However, after Union submitted timely voluntary responses, as provided in section 782(a) of the Act, the Department separately addressed the issue of whether it could examine voluntary respondents, considering its available resources in light of its workload, including the work involved in examining the two mandatory respondents, to determine whether examining voluntary respondents would be unduly burdensome or inhibit timely completion of the review.²⁶²

By the time we began analyzing the first supplemental responses of the two selected respondents, the workload level had not decreased or changed in a way that would have allowed us to accept Union as a voluntary respondent.²⁶³ This office is and has been conducting numerous concurrent antidumping duty and countervailing duty proceedings, which place a constraint on the number of analysts that could be assigned to this case. Not only do these other cases present a significant workload, but the deadlines for a number of the cases coincide and/or overlap with deadlines in this administrative review. In addition to the significant ongoing workload throughout Import Administration, recent developments including new investigations, new targeted dumping allegations, and new methodologies in zeroing and targeted dumping make clear that we could not have obtained any additional resources to devote to this administrative review.

With respect to the particular issues in this case, the Department required considerable time to analyze the questionnaire responses, and supplemental questionnaires for the selected respondents. The process required to adequately analyze the complex and voluminous data

²⁶⁰ See Voluntary Respondent Memo, dated August 30, 2012.

²⁶¹ See *Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review*, 77 FR 25405 (April 30, 2012).

²⁶² See Voluntary Respondent Memo at 3.

²⁶³ See *Id.*

and information submitted in this administrative review required significant time and resources such that it would not be simple to additionally review Union, as Union contends. Regardless of any ostensible simplicity in reviewing an additional company, the Department's past experience with this case demonstrates that examining another company such as Union would have required that the Department allot additional time and assign additional staff to analyze its responses (in addition to the staff completing its other casework within the statutory deadlines) at a level beyond the capacity of the Department's resources. The Department extended both the preliminary results and final results of the previous review in which Union was a respondent because of the additional time needed for analysis. Moreover, the Department explained in the Respondent Selection Memo that in certain past years, but not all, we have been able to accept voluntary respondents in this case. However, here, the Department faced the unusual burden of addressing the targeted dumping allegations in this case, which required the deferral of the final results of this review from January 4, 2012, to March 7, 2013, to adequately address the petitioner's allegations.²⁶⁴ The amount of work *per individual company* increases for each additional company involved in addressing these allegations because of post preliminary briefing an analysis akin to conducting an additional substantive analysis posed a substantial burden for the Department following the Preliminary Results of Antidumping Duty Administrative Review.

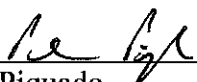
Accepting Union as a voluntary respondent, therefore, would have been unduly burdensome and inhibited not only the timely completion of the preliminary results, as explained above, but also the further, timely completion of the final results in this administrative review.

Recommendation:

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

Agree: ☒

Disagree: ☐



Paul Piquado
Assistant Secretary
for Import Administration

7 MARCH 2013
Date

²⁶⁴ See Memorandum to Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, through Melissa G. Skinner, Office Director Antidumping and Countervailing Duty Operations 3, from Cindy Robinson, Senior International Trade Compliance Analyst, Antidumping and Countervailing Duty Operations 3, entitled "Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated October 22, 2012.