



A-580-809

Administrative Review
POR: 11/01/2011-10/31/2012

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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Director, Office II
Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the 2011-2012
Administrative Review of Circular Welded Non-Alloy Steel Pipe
from the Republic of Korea

Summary

We analyzed the case and rebuttal briefs of interested parties in the 2011-2012 administrative review of the antidumping duty order (AD) on circular welded non-alloy steel pipe (CWP) from the Republic of Korea (Korea). As a result of our analysis, have made changes to the dumping margin calculations. We recommend that you approve the positions described in the “Discussion of Issues” section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments from parties.

List of Comments

- Comment 1: Cost Reallocation - Husteel
- Comment 2: General and Administrative Expenses, Rental Income Offset – Husteel
- Comment 3: General and Administrative Expenses, Miscellaneous Income Offset - Husteel
- Comment 4: General and Administrative Expenses, Litigation Accrual – HYSCO
- Comment 5: Capping of Interest Revenue – HYSCO
- Comment 6: Consideration of an Alternative Comparison Method in an Administrative Review
- Comment 7: Application of a Differential Pricing Analysis
- Comment 8: Denial of Offsets for Non-Dumped Sales With the Average-to-Transaction Method
- Comment 9: Withdrawal of the Regulations Governing Targeted Dumping in
Less-Than-Fair-Value Investigations

Background

On December 26, 2013, the Department of Commerce (the Department) published the preliminary results of the administrative review of the AD order on CWP from Korea, covering the period of review (POR) November 1, 2011, through October 31, 2012.¹ The administrative review covers two producers/exporters of the subject merchandise to the United States: HYSCO (HYSCO) and Husteel Co., Ltd (Husteel).

Following the *Preliminary Results*, from January 20 through 24, 2014, the Department conducted a verification of Husteel's sales questionnaire responses.²

HYSCO and Husteel requested a public hearing on January 24, 2014 and January 27, 2014, respectively. Wheatland Tube Company (Wheatland), a domestic interest party, requested a hearing, on January 27, 2014, with a portion to be held in a closed session. On May 27, 2014, HYSCO and Husteel withdrew their requests for a hearing. The Department held a hearing on June 12, 2014, with a portion held in a closed session.

On April 7, 2014, the Department issued a memorandum extending the time period for issuing the final results of this administrative review from April 25, 2014 to June 24, 2014, as permitted by section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.213(h)(2).³

On May 9, 2014, we received case briefs from Wheatland, with respect to Husteel, and from HYSCO. On May 14, 2014, we received rebuttal briefs from: Wheatland, with respect to HYSCO; United States Steel Corporation (U.S. Steel), a domestic interested party, with respect to HYSCO; and Husteel. On June 4, 2014, we rejected U.S. Steel's and Husteel's rebuttal briefs due to the inclusion of new factual information. U.S. Steel and Husteel resubmitted rebuttal briefs without the new factual information on June 5, 2014 and June 6, 2014, respectively.

Scope of the Order

The merchandise subject to the order is circular welded non-alloy steel pipe and tube, of circular cross-section, not more than 406.4mm (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, beveled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipes and tubes and are intended for the low-pressure conveyance of water, steam, natural gas, air, and other liquids and gases in plumbing and heating systems, air-conditioning units,

¹ See *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 78336 (December 26, 2013) (*Preliminary Results*).

² See Memorandum from Jennifer Meek and Sergio Balbontin to The File, "Verification of the Constructed Export-Price Sales Responses of Husteel Co. Ltd. in the Antidumping Investigation of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea," dated April 29, 2014.

³ See Memorandum from Mary Kolberg, to Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations entitled "Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review."

automatic sprinkler systems, and other related uses. Standard pipe may also be used for light load-bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and as support members for reconstruction or load-bearing purposes in the construction, shipbuilding, trucking, farm equipment, and other related industries. Unfinished conduit pipe is also included in the order.

All carbon-steel pipes and tubes within the physical description outlined above are included within the scope of the order except line pipe, oil-country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit.⁴

Imports of these products are currently classifiable under the following Harmonized Tariff Schedule (HTS) subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Changes to the Preliminary Results

Due to the adjustment in Husteel's reported cost (*see* Comment 1 below), the results of the differential pricing analysis have changed for Husteel from the *Preliminary Results*. For these final results, the Department finds that 42.89 percent of the value Husteel's U.S. sales pass the Cohen's *d* test, which confirms the existence of a pattern of prices for comparable merchandise that differ significantly among purchasers, regions, or time periods. Further the Department determines that the average-to-average (A-to-A) method cannot appropriately account for such differences because the resulting weighted-average dumping margins move across the *de minimis* threshold when calculated using the A-to-A method and an alternative method based on the average-to-transaction (A-to-T) method applied to the U.S. sales which pass the Cohen's *d* test. Accordingly, the Department determines to use the A-to-T method for Husteel's U.S. sales which passed the Cohen's *d* test and the A-to-A method for those U.S. sales which do not pass the Cohen's *d* test to calculate the weighted-average dumping margin for Husteel.

Discussion of the Issues

Comment 1: Cost Reallocation - Husteel

In the most recently completed administrative review of this order, the Department found that Husteel's reported per-unit costs exhibited significant variations that were unrelated to the

⁴ See *Final Negative Determination of Scope Inquiry on Certain Circular Welded Non-Alloy Steel Pipe and Tube From Brazil, the Republic of Korea, Mexico, and Venezuela*, 61 FR 11608 (March 21, 1996). In accordance with this determination, pipe certified to the API 5L line-pipe specification and pipe certified to both the API 5L line-pipe specifications and the less-stringent ASTM A-53 standard-pipe specifications, which falls within the physical parameters as outlined above, and entered as line pipe of a kind used for oil and gas pipelines is outside of the scope of the AD order.

physical characteristics of the products under review.⁵ To mitigate these distortive cost fluctuations, the Department revised Husteel's reported per-unit costs by weight-averaging direct material costs among products of the same grade, size, surface finish, and end finish, and conversion costs among products of the same thickness, surface finish, and end finish. In the *Preliminary Results* of the current review, however, the Department made no adjustments to Husteel's reported raw material and fabrication costs.

Wheatland argues that for these final results the Department should once again adjust Husteel's per-unit costs as they continue to reflect significant cost differences that are unrelated to the products' physical characteristics. First, Wheatland maintains that it is the Department's longstanding practice to require that costs be allocated among products in such a way that cost differences reflect each product's particular physical characteristics. According to Wheatland this practice is important for a variety of reasons, but especially where the dumping calculations require comparisons of U.S. prices with normal values (NVs) based on comparison market sales of similar merchandise, thus requiring the use of a difference in merchandise (DIFMER) adjustment, such as in the instant review. Quoting 19 CFR 351.411(b), Wheatland points out that when calculating the DIFMER adjustment, the Department "will consider only differences in variable costs associated with the physical differences" between products. Hence, cost differences associated with extraneous factors, such as production in different facilities with differing production efficiencies should not be considered for DIFMER adjustments.⁶ Furthermore, Wheatland notes that the Act requires that the reported costs "reasonably reflect the costs associated with the production and sale of the merchandise."⁷ Wheatland proffers that where a respondent's reported per-unit costs differ based on factors other than the physical characteristics, those costs fail to meet the statute's reasonableness requirement, and in such cases, the Department's practice is to reallocate costs to mitigate the distortion.⁸

In arguing for the reallocation of Husteel's reported costs in the instant case, Wheatland points out that in the *2010-11 Final Results* the Department determined that there were "unusual cost variations" between nearly identical products in Husteel's cost database. The Department attributed these unusual variations to the "fluctuation in POR hot-rolled coil prices in conjunction with Husteel's cost accounting methodology which assigns batch-specific results and coil consumption costs on a monthly weighted-average basis as opposed to annual weighted-average basis."⁹ Because the cost differences were found to be arbitrary and related to the timing of production rather than related to variations in the products' physical characteristics, the Department reallocated both raw material and fabrication costs to mitigate the distortions in Husteel's cost reporting methodology.

⁵ See *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 78 FR 35248 (June 12, 2013) (*2010-11 Final Results*) and accompanying Issues and Decision Memorandum (IDM) at Comment 6.

⁶ See Statement of Administrative Action (SAA) that accompanied the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, at 828 (1994).

⁷ See section 773(f)(1)(A) of the Act

⁸ In support, Wheatland references, e.g., *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 the UAE*) and accompanying IDM at Comment 9; *Polyethylene Retail Carrier Bags From Thailand: Final Results of Antidumping Duty Administrative Review*, 76 FR 12700 (March 8, 2011) and accompanying IDM at Comment 1; and *Thai Plastic Bags Indus. Co., Ltd. v. United States*, 853 F. Supp. 2d 1267, 1272-74 (CIT 2012).

⁹ See *2010-11 Final Results* and accompanying IDM at Comment 6.

In the instant review, Wheatland argues that Husteel has relied on the same cost reporting methodology which has again created significant distortions in the reported per-unit costs. To support its contention that CONNUMs with nearly identical physical characteristics exhibit significant cost differences, Wheatland provides three charts that compare Husteel's reported per-unit costs in the current review consistent with the analyses performed in the *2010-11 Final Results*.¹⁰

In the first chart, Wheatland provides examples that Husteel's reported cost data includes black pipes that have been reported with higher costs than galvanized pipes, and black pipes that have been reported with nearly identical costs as galvanized pipes, where all other physical characteristics are identical. Thus, the pipes that consumed the additional raw material, *i.e.*, zinc, were reported with costs lower than or similar to the cost for pipes that had not consumed the additional materials. Similarly, Wheatland also provides examples of non-coupled pipes that have been reported with higher costs than coupled pipes, again where all other physical characteristics are identical. In the final chart, Wheatland compares pipes identical in all physical characteristics except for wall thickness. Again, Wheatland contends that its results are consistent with the *2010-11 Final Results*, where the Department noted that cost differences between products identical except for minor variations in wall thickness are "disproportionate to or move in directions dissimilar to the variation in wall thickness."¹¹

Finally, Wheatland holds that there is no record evidence to support that these cost differences are attributable to differences in physical characteristics. Rather, they are again related to the same extraneous factors discussed in the *2010-11 Final Results*. According to Wheatland, the Department is faced with Husteel costs that once again do not "reflect meaningful cost differences attributable to . . . different physical characteristics."¹² As such, Wheatland contends that the Department may not "treat { } similar situations differently" without providing sufficient reasons for doing so."¹³ Therefore, Wheatland concludes that in order to mitigate the cost distortions present in Husteel's reported cost files the Department should rely on the same reallocation methodology that was employed in the *2010-11 Final Results*.

Husteel argues that the Department should continue to rely on Husteel's reported per-unit costs consistent with the *Preliminary Results*. Husteel points out that in conformity with section 773(f)(1)(A) of the Act, the Department's long-standing practice is to rely on a company's normal books and records if those records are kept in accordance with generally accepted accounting principles (GAAP) and reasonably reflect the costs associated with the production and sale of the merchandise under consideration.¹⁴ Another long-standing Departmental practice, according to Husteel, is the requirement for the POR costs to be weight-averaged on a CONNUM-specific basis because such costs average out normal anomalies that occur as a

¹⁰ See Wheatland's May 9, 2014, Case Brief (Wheatland's Brief) at Attachments 1-3.

¹¹ See *2010-11 Final Results* and accompanying IDM at Comment 6.

¹² *Id.*

¹³ See *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001).

¹⁴ Husteel cites, *e.g.*, *Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review*, 74 FR 47201 (September 15, 2009) (*Shrimp from Ecuador*) and accompanying IDM at Comment 5.

company records thousands of transactions over a year.¹⁵ With these practices in mind, Husteel submits that the record unquestionably supports that the company relied on the product-specific costs from its normal books and records for reporting to the Department. Specifically, Husteel notes the Department verified its reported costs in the current review and in doing so stated that Husteel's normal books and records account for all five of the Department's physical characteristics,¹⁶ that Husteel tracks hot-rolled coil (HRC) to the specific products that consume the coil,¹⁷ that products are allocated processing costs based on the amount of processing received,¹⁸ and that the allocation of labor and overhead to specific products are consistent with how the products are produced.¹⁹ Thus, in order to comply with the Department's request for a single weighted-average cost for each CONNUM, Husteel merely weight-averaged the POR monthly CONNUM-specific costs from its normal books.

Having established that its reported costs are based on its normal books and records, Husteel contends that Wheatland fails to provide any record evidence to support its conclusion that the reported costs do not reasonably reflect the costs associated with the production and sale of the merchandise. In fact, according to Husteel, the record demonstrates just the opposite -- that any cost differences that exist between seemingly similar CONNUMs are attributable to the physical characteristics. In support, Husteel references its supplemental section D response where it explained that in general cost differences among relatively similar CONNUMs are related to products being produced in small quantities in a single month, the bulk of production occurring in months with higher HRC costs, or the use of an outside processor for galvanizing certain pipes.²⁰ Husteel again points out that the Department verified that it assigns the actual raw material input costs to the specific products produced; hence, any observed cost differences are related to differences in the actual raw material inputs. Thus, Husteel denies Wheatland's claim that the cost differences between similar CONNUMs are unrelated to the physical characteristics of the products produced.

Citing to *Shrimp from Ecuador*, Husteel contends that where raw material costs varied between products that differed only in characteristics that should not impact raw material costs, *e.g.*, container weight, the Department still found that no adjustment was necessary since the reported costs reflected the annual weighted-average raw material costs. In the instant case, Husteel proffers that it reported POR weighted-average raw material costs. Furthermore, these costs reflect the actual raw material inputs required to produce the end finish, surface finish, and wall thickness, *i.e.*, the physical characteristics, of the finished products. Thus, Husteel concludes that there is no basis for a revision of its reported costs.

¹⁵ Husteel cites *Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review*, 76 FR 2332 (January 13, 2011) at Comment 7. Husteel also cites the Department's section D questionnaire, dated February 4, 2013, at 2.

¹⁶ See Memorandum to the File from Heidi K. Schriefer and Robert Greger to The File, "Verification of the Cost Response of Husteel Co., Ltd. in the Antidumping Duty Administrative Review of Certain Non-Alloy Steel Pipe from the Republic of Korea," dated December 18, 2013, (Husteel Cost Verification Report) at 5.

¹⁷ *Id.* at 16-17.

¹⁸ *Id.* at 20.

¹⁹ *Id.* at 21.

²⁰ See Husteel's July 10, 2014 Supplemental Section D Response (Husteel Sup D) at 7.

Department's Position: We agree with Wheatland and reallocated Husteel's HRC and fabrication costs to mitigate cost differences that are unrelated to the reported products' physical characteristics.

When the Department evaluates a respondent's submitted costs, section 773(f)(1)(A) of the Act provides that "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise."

Accordingly, the Department is instructed to rely on a company's normal books and records if two conditions are met: 1) the books are kept in accordance with the home country's GAAP; and 2) the books reasonably reflect the cost to produce and sell the merchandise. In the instant case, it is unchallenged that the unadjusted per-unit costs are derived from Husteel's normal books and that those books are in accordance with Korean GAAP. Hence, the question facing the Department is whether the per-unit costs from Husteel's normal books reasonably reflect the cost to produce and sell the merchandise under consideration.

At the outset of a case, the Department identifies the physical characteristics that are the most significant in differentiating between products. These are the physical characteristics that define unique products, *i.e.*, the CONNUMs, for sales comparison purposes. The level of detail within each physical characteristic (*e.g.*, the multiple different grades or sizes of a product) reflects the importance, with price-to-price comparisons, that the Department places on establishing NVs based on comparison market sales of identical, or the most similar, foreign like product. Thus, under sections 773(f)(1)(A) and 773(a)(6)(c)(ii) and (iii) of the Act, a respondent's reported product costs should reflect meaningful cost differences attributable to these different physical characteristics. This ensures that the product-specific costs we use for the sales-below-cost test, constructed export price (CEP) profit, constructed value (CV), and the DIFMER adjustment accurately reflect the distinct physical characteristics of the products whose sales prices are used in the Department's dumping calculations.

The physical characteristics identified in this case are pipe grade, nominal pipe size, pipe wall thickness, surface finish, and end finish.²¹ Based on an analysis of Husteel's reported cost data, the Department continues to find that the fluctuation in costs between CONNUMs cannot be explained by the differences in the physical characteristics of those CONNUMs.²² As noted by Wheatland, simplified examples of these inconsistencies include black pipes reported with higher costs than galvanized pipe, or non-coupled pipes reported with higher total costs than coupled pipes, where all other physical characteristics between the products are identical. Hence, these pipes differ only in the fact that they consumed additional material, *i.e.*, zinc or couples; however, the pipes that consumed the additional material were reported with lower costs than the pipes that had not consumed the additional material.²³ As another illustration, there are pipes that are identical with exception of wall thickness, that demonstrate significant cost differences that appear to be disproportionate to or to move in directions dissimilar to the variation in wall thickness.²⁴

²¹ See, *e.g.*, the Department's February 4, 2012 section B questionnaire at B-8 and B-9.

²² See Wheatland's Brief at Attachments 1-3.

²³ *Id.*

²⁴ *Id.*

With regard to raw material costs, these unusual variations appear to be related to the manner in which Husteel calculates product-specific costs in its normal accounting records.²⁵ Specifically, in its normal books Husteel calculates product specific costs that reflect the monthly weighted-average cost of the HRC consumed.²⁶ While Husteel maintains that because it traces the HRC input cost to the specific product that was produced, the cost differences between its reported products reflect only the physical differences in the types and variety of raw materials consumed, the Department disagrees. Because the HRC costs reflect monthly averages, the Department notes that under certain conditions, *e.g.*, fluctuating raw material prices, inefficient production runs, and limited production of specific CONNUMs, this methodology could result in unusual cost variations. In fact, in the very supplemental section D response referenced by Husteel, the company acknowledges that varying monthly HRC costs and the size of production runs contributed to the significant cost differences observed among physically similar CONNUMs.²⁷ Hence, the Department finds that such fluctuations in POR monthly HRC prices in conjunction with Husteel's cost accounting methodology, which assigns HRC consumption costs on a monthly weighted-average basis as opposed to annual weighted-average basis, are the main drivers of the unusual cost variations observed in Husteel's cost database.²⁸

The Department faced similar situations where a CONNUM's costs were highly dependent on either specific production runs or on the timing of the main raw material purchases under a cost allocation methodology that reflects a narrow population of the main raw material purchases (*e.g.*, coil-specific, first in first out, monthly weight-averages, *etc.*) when allocating raw material costs to the products produced. For example, in *UK Bar*, the Department found that the respondent's costs from its normal books and records were distortive.²⁹ In that case, the respondent assigned a specific billet purchase price to each job order within a CONNUM, and because it produced and sold each product only a limited number of times during the cost reporting period, the specific billet costs did not represent the unit cost normally experienced by the company to produce the product during that time period. Similarly, in *Nails from the UAE*, the Department reallocated the respondent's direct material costs from its normal books and records because the product-specific cost differences were related to timing differences rather than differences in physical characteristics.³⁰ In fact, the U.S. Court of International Trade (CIT) upheld our reallocation of costs where a respondent's reported costs reflect cost differences due to factors other than physical characteristics.³¹

Under section 773(b)(1)(B) of the Act, the Department tests whether sales in the home market were made at prices which permit recovery of all costs within a reasonable time period. In doing so, the Department's normal practice is to use POR annual average costs to calculate cost of production (COP). The Department uses annual average costs in order to even out

²⁵ As noted by Husteel, the per-unit costs are calculated on a CONNUM-specific basis in its normal books.

²⁶ See, *e.g.*, Cost Verification Report at 16 and Cost Verification Exhibits (CVE) 7-9.

²⁷ See Husteel's May 14, 2014, Rebuttal Brief (Husteel's Rebuttal Brief) at 8 and Husteel's Sup D at 7.

²⁸ Under section 773(b)(1)(B) of the Act, we test whether sales in the home market were made at prices which permit recovery of all costs within a reasonable time period. In doing so, the Department's normal practice is to use POR annual average costs to calculate COP.

²⁹ See *Stainless Steel Bar from the United Kingdom: Final Results of Antidumping Duty Administrative Review*, 72 FR 43598 (August 6, 2007) (*UK Bar*) and accompanying IDM at Comment 1.

³⁰ See *Nails from the UAE* and accompanying IDM at Comment 9.

³¹ See *Thai Plastic Bag Indus. Co., Ltd. v. United States*, 752 F. Supp. 2d 1316, 1324-25 (CIT 2010).

swings in the production costs experienced by the respondent over short periods of time. This way, we smooth out the effect of fluctuating raw material costs, erratic production levels, major repairs and maintenance, inefficient production runs, and seasonality.³²

Fluctuations in raw material costs, in particular, can be influenced by discretionary business practices such as the inventory valuation method used by the company (*e.g.*, first-in, first-out, weighted-average, specific identification, *etc.*), purchase transaction terms, purchase dates, the raw material inventory turnover period, the extent to which raw materials are purchased pursuant to long-term contracts, and whether finished merchandise is sold to order or from inventory. Over a reasonable period of time, these factors tend to smooth out, resulting in an average cost that reasonably reflects the COP for sales of a particular product made during the POR. In this instance, however, Husteel normally allocates HRC costs to products at the weighted-average monthly cost of the particular coil (*i.e.*, by type, thickness, and width of coil). While Husteel then weight-averaged its POR monthly CONNUM-specific per-unit costs, Husteel produced and sold certain CONNUMs a limited number of times during the cost reporting period. As a result, cost differences emerged between products that were related to the timing of production, *i.e.*, the monthly production efficiency and market price of the coil consumed, rather than related to the physical characteristics of the pipe produced. For example, consider a galvanized pipe that was produced only in a month where hot-rolled coil prices were at their lowest and a similar pipe that is identical in all characteristics except galvanizing, *i.e.*, it is plain pipe, that is produced only in a month where HRC prices were at their highest. Under Husteel's normal methodology, the plain pipe has been reported to the Department with a higher raw material cost than the galvanized pipe. Hence the timing of the HRC purchase and the timing of the pipe production would influence the cost of the pipe rather than the pipe's physical characteristics.

Husteel submits that the use of a subcontractor for galvanizing certain pipes explains the difference in raw material costs between black and galvanized pipe because in such cases the zinc costs are included with the subcontract fees under overhead. While this explains a few of the observations where black pipe has been assigned raw material costs that are higher than or similar to galvanized pipe, it does not explain those cases where the HRC costs, which have been identified under a separate raw material cost field in this review than the zinc costs, are lower for certain galvanized pipes than for the black pipes that would have consumed the same HRC. In fact, in its supplemental response Husteel explains that such variations in HRC costs are caused by "the months of production."³³ Addressing a specific pairing of CONNUMs identified by the Department, Husteel elaborates that "{s}equence 293 was produced throughout the period, while sequence 294 was produced only in the later part of the period when hot-rolled coil costs were lower."³⁴

³² See, *e.g.*, *UK Bar and accompanying IDM at Comment 1; Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part*, 70 FR 67665, (November 8, 2005), and accompanying IDM at Comment 1; *Color Television Receivers from the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 55 FR 26225 (June 27, 1990) at Comment 10; *Grey Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review*, 58 FR 47253, 47256 (September 8, 1993) and accompanying IDM at Comment 3.

³³ See Husteel's Sup D at 7.

³⁴ *Id.*

Based on the foregoing discussion, *i.e.*, the fact that the reported costs for different products do not reflect cost differences that logically result from differences in the products' physical characteristics, the Department finds that Husteel's HRC costs do not reasonably reflect POR average costs.³⁵ Consequently, the Department determines that in this review, Husteel's methodology results in arbitrary cost differences between CONNUMs which are independent of the physical differences between products. Thus, for these final results, the Department reallocated Husteel's reported raw material costs among products of the same pipe grade, nominal pipe size, surface finish, and end finish (coupled-versus non-coupled pipe) and fabrication costs among products of the same thickness, surface finish, and end finish.

Husteel proffers as support for its reported costs *Shrimp from Ecuador* where Husteel claims there were cost variations between products that differed only in characteristics that should not impact raw material costs, *e.g.*, container weight, but the Department did not adjust the reported costs since they reflected the annual weighted-average raw material costs. Husteel claims that it likewise reported POR weighted-average raw material costs hence no adjustment is necessary. While Husteel correctly reports that the respondents' costs were not adjusted in *Shrimp from Ecuador*, the Department declined to adjust the costs because the respondents' "reported cost differences are associated with differences in the physical characteristics," and the "the reported raw material cost for their value-added products was based on the annual average cost for the shrimp count sizes that went into producing each value-added product."³⁶ In fact, contrary to Husteel's assertions, the Department's position commences with "{w}e disagree with the Domestic Producers that container weight does not have an impact on the raw material costs." Furthermore, the respondents in *Shrimp from Ecuador* relied on annual weighted-average raw material costs, whereas Husteel's methodology relies on a weighted-average of the monthly control-number-specific raw material costs only from the months in which a particular product was produced. If raw material prices are relatively stable and production runs are always the same efficiency or if products were produced evenly over all months of the POR, such a methodology would not result in cost distortions. However, as explained in the preceding paragraphs, such was not found to be the case in the instant review.

Comment 2: General and Administrative Expenses, Rental Income Offset – Husteel

Wheatland argues that Husteel's request to offset general and administrative (G&A) expenses with rental income should be denied because it has not been adequately explained. Citing *Pineapple from Thailand* and *SSB from Taiwan*, Wheatland contends that rental income that is related to the general operations of a company can be used to offset G&A expenses; however, rental income that is unrelated to the company's core business may not.³⁷ Wheatland claims that because neither Husteel's questionnaire responses nor its verification reports support whether the rental income is related to the general operations of the company, the offset must be denied since it is the respondent's burden to provide the necessary information. In support,

³⁵ See, *e.g.*, Wheatland's Brief at Attachments 1-3.

³⁶ See *Shrimp from Ecuador* and accompanying IDM at Comment 5.

³⁷ See *Notice of Final Results of Antidumping Duty Administrative Review and Final Determination Not to Revoke Order in Part: Canned Pineapple Fruit from Thailand*, 65 FR 77851 (December 13, 2000) (*Pineapple from Thailand*) and accompanying IDM at Comment 12 and *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Taiwan*, 67 FR 35484 (May 20, 2002) (*SSB from Taiwan*) and accompanying IDM at Comment 3.

Wheatland references *CORE from Korea* where the Department denied the exclusion of other bad debt expenses from G&A expenses because the respondent failed to demonstrate that the expense should have been classified as sales-related.³⁸ Moreover, Wheatland contends that because it is incumbent on a respondent to provide such information, whether or not the Department specifically requested such information from Husteel is irrelevant.

Finally, Wheatland argues that Husteel did not deduct such rental income in the prior review but failed to explain how the facts changed to warrant a change in the methodology used to calculate G&A expenses in the instant review. Wheatland notes that while the Department has the discretion to change the methodology used in a previous review, when doing so it must “also show that there are good reasons” for changing its methodology.³⁹ Because Husteel provided no information about the nature of its rental income or explained how the facts changed from the previous review, there is no basis for allowing this offset to Husteel’s G&A expenses when such expenses were not allowed in the prior review.

Husteel counters that the Department did not request additional information regarding the rental income in either its supplemental questionnaires or at the cost verification. In fact, at verification the Department selected several line items from the detailed list of non-operating income (which includes rental income) for examination and found no discrepancies. Hence, Husteel argues that the fact that the Department did not select rental income for detailed examination does not mean that Husteel failed to meet its alleged burden to support its reported offset.

According to Husteel, Wheatland’s reliance on *CORE from Korea* is misplaced as the proper classification of the other bad debt expenses based on the company’s reporting and its financial statements was unclear, whereas in this situation there is no confusion. Husteel states that it consistently classified the rental income as non-operating in both its financial statements and in its G&A expense rate calculation which was verified by the Department. Furthermore, citing *Rebar from Turkey*, Husteel contends that it is the Department’s practice to allow offsets to G&A expenses for rental income related to the general operations of a company.⁴⁰ Because it has neither created an unambiguous record nor failed to provide information requested by the Department, Husteel argues that it is under no additional burden of proof.⁴¹ Thus, Husteel concludes that the Department should continue to allow the rental income as an offset to G&A expenses in the final results.

Department’s Position: We agree with Husteel and continue to allow rental income as an offset to the company’s G&A expenses. As Wheatland states, it is the Department’s practice to allow offsets to the G&A expense rate for rental income related to the general operations of the

³⁸ See *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 from Korea*) and accompanying IDM at Comment 17.

³⁹ See *Huvis Corp. v. United States*, 570 F.3d 1347, 1354 (Fed. Cir. 2009).

⁴⁰ See *Certain Steel Concrete Reinforcing Bars from Turkey: Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 FR 65082 (November 7, 2006) (*Rebar from Turkey*).

⁴¹ Husteel cites *Rebar from Turkey* at Comment 14, granting a requested adjustment to G&A expense and noting that the respondent had not failed to meet its burden of proof because the Department had requested no further information to substantiate the requested adjustment.

company, but to exclude the items if it relates to a separate line of business (e.g., a hotel or apartment building).⁴² At verification, we examined the income items that Husteel claimed as offsets to G&A expenses. We note that the rental income in question was separately presented as part of the company's non-operating income and expense items both in Husteel's audited financial statements and in the G&A expense rate calculation.⁴³ Because Husteel's non-operating activities included numerous items, the Department's examination was limited to certain major line items. While the Department did not select rental income for examination, we note that Husteel fully cooperated and provided supporting documentation for each of the non-operating items that were chosen for additional verification. Based on Husteel's response, the Department found no evidence that any of the G&A offsets claimed by Husteel were unrelated to the general operations of the company.⁴⁴ Thus, the Department disagrees with Wheatland that Husteel failed to support the income items that were requested as offsets to G&A expenses.

Furthermore, based on the Husteel's overall reconciliation and G&A expense rate calculation worksheets, the Department found that the costs associated with rental activities were included in the reported costs.⁴⁵ Additionally, contrary to Wheatland's assertions, the Department points out that the rental income was not rejected as an offset in the prior year, but rather Husteel did not request the offset. Regardless, the rental income was requested as an offset in the current review, was subject to the Department's verification, and there is no evidence on the record that the income is unrelated to the general operations of the company. That is, Husteel's financial statements do not indicate that they hold rental assets such as hotels or apartment buildings. Therefore, for these final results, we continue to allow the rental income as an offset to Husteel's G&A expenses.

Comment 3: General and Administrative Expenses, Miscellaneous Income Offset – Husteel

Wheatland argues that Husteel's request to offset G&A expenses with salary reimbursements for employees loaned to its Saudi Arabian affiliate should be denied since the costs associated with the activity were excluded from the reported costs. To reach this conclusion, Wheatland points to Husteel's statement that the reported labor costs are limited to "workers directly involved in the production of the merchandise under consideration" and to a G&A calculation worksheet that segregates certain costs as United States, third country, domestic, and other, where only the other category was included in G&A expenses.⁴⁶ Assuming that Saudi Arabia would be included under third country, Wheatland contends that the salary expenses related to the reimbursements are not included in either the reported G&A expenses or the reported labor costs.

Husteel counters that the Department verified Husteel's costs including its G&A calculation and found no discrepancies. In fact, according to Husteel, the Department reviewed the salary

⁴² See, e.g., *Stainless Steel Sheet and Strip in Coils from Taiwan: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 7519 (February 13, 2006), and accompanying IDM at Comment 18, and *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada*, 70 FR 12181 (March 11, 2005) and accompanying IDM at Comment 62.

⁴³ See CVR at CVE 13.

⁴⁴ See CVR at 24.

⁴⁵ *Id.* at 8-12 and 24.

⁴⁶ See Wheatland's Brief at 15 and Husteel's April 5, 2103 section D response at 24.

reimbursements under question and specifically stated in the Husteel Cost Verification Report that “the expenses related to the above items {including salaries for the Saudi affiliate} were also included in the reported costs.”⁴⁷ Thus, Wheatland’s claim that the costs were not included in Husteel’s reported costs is contrary to the Department’s findings at verification.

Department’s Position: We agree with Husteel and continue to allow the salary reimbursement income as an offset to the company’s G&A expenses. As pointed out by Husteel, the Department’s verification report states that the costs associated with the income items used as offsets to the G&A expenses were included in the reported costs.⁴⁸ We note that the G&A calculation worksheet referenced by Wheatland in support of its contention merely segregated the salary-related expenses of sales staff from all other staff.⁴⁹ Thus, the salaries designated as third country would not include the salaries of technical or administrative employees that would have been assigned or loaned out to such countries. Consequently, for these final results, we continue to allow the salary reimbursements income as an offset to Husteel’s G&A expenses.

Comment 4: General and Administrative Expenses, Litigation Accrual – HYSCO

Hysco argues that the Department erred at the *Preliminary Results* by adjusting its reported G&A expenses to include a litigation accrual related to antitrust penalties. HYSCO maintains that the penalties in question are directly related to the selling activities associated with non-subject merchandise during the period from March 2005 through November 2010, which predates the POR. HYSCO cites *Live Swine from Canada*⁵⁰ where the Department specifically excluded a fine related to a prior period from a respondent’s G&A expenses and contends that all of the same factors apply here. HYSCO asserts that including an expense associated with non-subject merchandise that was generated in a prior period in the current POR cost of production for subject merchandise is both illogical and unreasonable. Thus, HYSCO concludes, the Department should eliminate this adjustment for the final results.

U.S. Steel and Wheatland counter that the Department properly included the expenses related to the litigation accrual in HYSCO’s total G&A expenses at the preliminary results.

According to U.S. Steel, the accruals in question are clearly not related to current production but rather are general expenses that must be absorbed by HYSCO’s general operations. U.S. Steel asserts that this is exactly why HYSCO itself reported these expenses as miscellaneous losses in its financial statements instead of reporting them as cost of sales. Therefore, U.S. Steel contends, these expenses are properly included in HYSCO’s total G&A expenses in accordance with well-established Department practice.⁵¹

U.S. Steel argues that there is no merit to HYSCO’s arguments that the accrued penalties should be excluded from G&A expense because the activities that gave rise to the penalties occurred in

⁴⁷ See Husteel Rebuttal Brief at 11 and Husteel Cost Verification Report at 24.

⁴⁸ See Husteel Cost Verification Report at 24.

⁴⁹ *Id.* at 23 and CVE 13.

⁵⁰ See *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada*, 70 FR 12181 (March 11, 2005) (*Live Swine from Canada*) and accompanying IDM at Comment 49.

⁵¹ U.S. Steel cites *Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review*, 74 FR 50774 (October 1, 2009) (*Chlor-Isos from Spain*) and accompanying IDM at Comment 1.

prior periods. U.S. Steel refutes HYSCO's reliance on *Live Swine from Canada* to support its position and asserts that in that investigation the liability for the offense was known and quantifiable in the prior period, whereas in the instant proceeding the legal fines were not probable and reasonably estimable until the 2012 fiscal year (*i.e.*, the fiscal year on which HYSCO's G&A expense ratio is based). Thus, U.S. Steel concludes, the litigation accrual should continue to be included in the G&A expense ratio calculation at the final results.

Wheatland agrees that HYSCO's reliance on *Live Swine from Canada* is misplaced. Wheatland points out that the situation in *Live Swine from Canada* is different from the current review because in that investigation the respondent's books were maintained on a cash basis and the liability was already recognized in a prior period. Conversely, Wheatland asserts, HYSCO's liability was first recorded and recognized in 2012.⁵² Accordingly, Wheatland argues, HYSCO's litigation accrual must be recognized in the current period G&A expense ratio based on the 2012 financial statements. Wheatland posits that not recognizing these expenses in the current period would result in a methodology whereby the costs would never be recognized in any dumping calculation.

Wheatland argues that HYSCO's claim that the legal fines should be assigned to non-subject products must be rejected, as this would contradict HYSCO's treatment of these costs as general expenses in its own accounting records. Further, Wheatland notes that the treatment of these costs as general expenses was fully in accordance with Korean GAAP, and HYSCO has provided no evidence that this methodology is somehow unreasonable. Finally, Wheatland cites *Magnesium Metal from Russia*⁵³ and argues that excluding the litigation accruals from HYSCO's G&A expenses would be inconsistent with the long-established Department practice of including penalties and fines in the G&A expense ratio calculation.

Department's Position: We agree with the petitioners and continue to include the litigation accrual in HYSCO's G&A expenses for the final results. In calculating the G&A expense ratio, the Department normally includes certain expenses and revenues that relate to the general operations of the company as a whole, as opposed to including only those expenses that directly relate to the production of the merchandise under consideration. The CIT agreed with the Department that G&A expenses are those expenses which relate to the general operations of the company as a whole rather than to the production process.⁵⁴

If the Department identifies expenses that are directly related to a particular production process or product, we normally and more appropriately consider those expenses to be manufacturing

⁵² Wheatland cites *Cut-to-Length Carbon Steel Plate from Romania: Final Results of Antidumping Duty Administrative Review and Final Partial Rescission*, 72 FR 6522 (February 12, 2007) (*CTL Plate from Romania*) and accompanying IDM at Comment 3, and *Shrimp from Ecuador* and accompanying IDM at Comment 11.

⁵³ See *Magnesium Metal from the Russian Federation: Notice of Final Determination of Sales at Less Than Fair Value*, 70 FR 9041 (February 24, 2005) (*Magnesium Metal from Russia*) and accompanying IDM at Comment 10.

⁵⁴ See *U.S. Steel Group, et al. v. United States*, 998 F. Supp 1151, 1154 (CIT 1998) (citing *Rautaruukki Oy v. United States*, 19 CIT 438, 444 (CIT 1995)).

costs. In contrast, G&A expenses by their nature are indirect expenses incurred by the company as a whole, and are not directly related to any product.⁵⁵

With regard specifically to litigation accruals, the Department's established practice is to consider such expenses as related to general operations, rather than to a specific product.⁵⁶ Thus, we find that such expenses are more appropriately captured as G&A expenses rather than as part of the cost of manufacturing. This very treatment of the litigation accruals as general expenses was followed by HYSCO in its audited financial statements in accordance with Korean GAAP, and there is no evidence on the record to support a conclusion that this methodology is unreasonable. Further, despite HYSCO's objections, the fact that the underlying events that led to the accrual of the penalties took place prior to the POR does not change the fact that these expenses are related to general operations in the current year. Under Korean GAAP, the accruals were recognized and recorded as current expenses for the first time in the 2012 audited financial statements when they became probable and reasonably estimable. In such instances, the Department's consistent practice is to follow the financial statement treatment and include the costs as current year expenses.⁵⁷

With regard to *Live Swine from Canada*, we agree with the petitioners that HYSCO's reliance is misplaced. As noted by Wheatland, the specified costs in *Live Swine from Canada* were known and quantifiable in the period preceding the POI as opposed to being captured for the first time in the current year as is the situation here.

Accordingly, as we find that our methodology in this proceeding follows the treatment in HYSCO's audited financial statements prepared in accordance with Korean GAAP and follows a well-established practice supported by ample case precedent, we continue to adjust the G&A expense ratio to include the litigation accruals for the final results.

Comment 5: Capping of Interest Revenue -- HYSCO

HYSCO argues that the Department did not cap interest revenue by the amount of HYSCO's imputed credit expenses in the *Preliminary Results*,⁵⁸ which contradicts the Department's recent practice of capping reported sales-related revenues by directly-associated selling expenses.⁵⁹

⁵⁵ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17413 (March 26, 2012) and accompanying IDM at Comment 33 and *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 FR 24329, 24354 (May 6, 1999), and accompanying IDM at Comment 25.

⁵⁶ See, e.g., *CTL Plate from Romania* and accompanying IDM at Comment 3; see also *Notice of Final Results of Antidumping Duty Administrative Review, Rescission of Administrative Review in Part, and Final Determination to Revoke Order in Part: Canned Pineapple Fruit from Thailand*, 67 FR 76718 (December 13, 2002) and accompanying IDM at Comment 7.

⁵⁷ See, e.g., *CTL Plate from Romania* and accompanying IDM at Comment 3 and *Chlor-Isos from Spain* and accompanying IDM at Comment 1.

⁵⁸ See Memorandum to the File from Mary Kolberg, Preliminary Results Calculation Memorandum for Hyundai HYSCO (December 18, 2013) at Attachment I.

⁵⁹ See, e.g., *Light-Walled Rectangular Pipe and Tube From Mexico; Final Results of Antidumping Duty Administrative Review*, 76 FR 9547 (February 18, 2011) (*Light-Walled from Mexico*) and accompanying IDM Comment 6.

HYSCO asserts that, in line with the Department's current practice, the Department should correct this error in the final results.

Wheatland disagrees with HYSCO, claiming that HYSCO mistakes the Department's current practice. According to HYSCO, since *Light-Walled from Mexico*, the Department has been very clear that there is no cap on interest revenue. Wheatland cites to the final results of *Orange Juice from Brazil* in which the Department found that "interest revenue related to late payment of invoices should not be used as an offset to credit. Rather, this interest revenue is more appropriately treated as a price adjustment. See 19 CFR 351.401(c)." ⁶⁰ In addition, Wheatland notes the Department affirmed its practice in more recent proceedings. ⁶¹ Moreover, HYSCO made the same argument in the most recently completed review of this order, which the Department rejected. ⁶²

Department's Position: We agree with Wheatland. Consistent with our practice stated in *Orange Juice from Brazil*, we continue to treat HYSCO's interest revenue as a price adjustment and did not cap it with HYSCO's imputed credit expenses. According to its submissions, HYSCO's interest revenue for home market sales was for late payment of invoices from its customers. In *Orange Juice from Brazil*, the Department noted that "interest revenue related to late payment of invoices should not be used as an offset to credit. Rather, this interest revenue is more appropriately treated as a price adjustment. See 19 CFR 351.401(c)." Also in *Orange Juice from Brazil*, we also noted that "interest revenue earned as late payment fees is a different type of revenue than the movement- or packing-related revenue which we have normally treated as an offset to expenses deducted under the circumstance-of-sale adjustment provision of the Act" ⁶³ and that treating interest revenue earned as late payment fees as a price adjustment is reasonable.

Comment 6: Consideration of an Alternative Comparison Method in an Administrative Review

HYSCO asserts that in the *Preliminary Results* the Department performed a differential pricing analysis and found "the existence of a pattern of CEPs for comparable merchandise that differ significantly among purchasers, regions, or time periods" and determined that "the average-to-average method cannot appropriately account for such differences." HYSCO argues that the Department lacks the statutory authority to consider an alternative comparison method and apply a differential pricing analysis in an administrative review. HYSCO claims that the statutory authority the Department relies upon to consider an alternative comparison method, which is set forth at section 777A(d)(1)(B) of the Act, is limited to original investigations.

⁶⁰ See *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, Determination Not to Revoke Antidumping Duty Order in Part, and Final No Shipment Determination*, 76 FR 50176 (August 12, 2011) (*Orange Juice from Brazil*) and accompanying IDM at Comment 2.

⁶¹ See *Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011*, 77 FR 73415 (December 10, 2012) (*10-11 Ball Bearings Final*) and accompanying IDM at Comment 6; *Ball Bearing and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Administrative and Changed Circumstances Reviews*, 76 FR 52937 (August 24, 2011) and accompanying IDM at Comment 12.

⁶² See *2010-11 Final Results* and accompanying IDM at Comment 15.

⁶³ See *Orange Juice from Brazil*, and accompanying IDM at Comment 2.

HYSCO maintains that section 777A(d) of the Act contains the statutory rules for determining whether sales have been made at less than fair value. Specifically, HYSCO maintains that paragraph (d)(1)(A) contains the general calculation rule for original “investigations,” and paragraph (d)(1)(B) sets forth the “exception” to this general rule. HYSCO maintains that paragraph (d)(1)(B) explicitly identifies the Department’s authority to use an alternative comparison method as an exception to the standard comparison method in original investigations only.

HYSCO continues that section 777A(d)(2) of the Act sets forth the calculation rule for administrative reviews, and no similar provision for an alternative comparison method and application of differential pricing exists. According to HYSCO, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987), states 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.” Therefore, HYSCO maintains the Department is not lawfully permitted under the statute to consider an alternative comparison method or to apply a differential pricing analysis in an administrative review.

Wheatland and U.S. Steel maintain that the Department has the authority to use the A-to-T method for all U.S. sales in an administrative review. According to U.S. Steel, section 777A(d)(2)(2012) of the Act allows the Department to use the A-to-T method for all U.S. sales in all administrative reviews, noting that “In {an administrative} review..., when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.”⁶⁴ Similarly, U.S. Steel argues that the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (“SAA”) states that the use of the A-to-T method is the “preferred methodology” in administrative reviews because it combats the problem of targeted dumping.⁶⁵ U.S. Steel asserts that there is no provision in the statute relating to an alternative comparison method or differential pricing in administrative reviews because, unlike the provisions pertaining to investigations, the use of the A-to-T method in administrative reviews is already expressly authorized in the statute.

Wheatland notes that the respondent in this review argued that “there is no statutory authority for the Department to apply a ‘targeted dumping’ or ‘differential pricing’ analysis in an administrative review” because the statute governing targeted dumping or differential pricing only applies in less-than-fair-value investigations and not in administrative reviews.” Wheatland and U.S. Steel note that the Department applied differential pricing in numerous administrative reviews, and the Department dismissed numerous challenges to its statutory authority to analyze patterns of significant price differences and apply an alternative comparison

⁶⁴ Section 777A(d)(2) (2012) .

⁶⁵ SAA, H.R. Rep. No. 103-316(1994) at 843; reprinted in 1994 U.S.C.C.A.N. 4040, 4178.

method based on those differences in administrative review.⁶⁶ Citing *PET Film from the UAE*, Wheatland argues that the Department rejected this argument and found the application of differential pricing in administrative reviews to be reasonable.⁶⁷ According to Wheatland, in *PET Film from the UAE*, the Department found:

the analysis that has been used in less-than-fair-value investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review. In less-than-fair-value investigations, the Department considers an alternative comparison method to unmask dumping consistent with section 777A(d)(1)(B) of the Act. Similarly, the Department considers an alternative comparison method to unmask dumping under 19 CFR 351.414(c)(1). For this administrative review, the Department continues to find the consideration of an alternative comparison method to be reasonable where the statute made no provision for the Department to follow.⁶⁸

Department's Position: The Department disagrees with HYSCO's claim that it does not have the authority to consider an alternative comparison method in administrative reviews. Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." By definition, a "dumping margin" requires a comparison of NV and export price (EP) or CEP. Before making the comparison required, it is necessary to determine how to make the comparison.

HYSCO argues that the Department has no statutory authority to consider the application of an alternative comparison method in administrative reviews. HYSCO also states that Congress made no provision for the Department to apply an alternative comparison method in an administrative review under section 777A(d) of the Act. Indeed, section 777A(d)(1) of the Act applies to "Investigations" and section 777A(d)(2) of the Act applies to "Reviews." Section 777A(d)(1) of the Act discusses, for investigations, the standard comparison methods (*i.e.*, the A-to-A method or the transaction-to-transaction (T-to-T) method), and then provides for an alternative comparison method (*i.e.*, the A-to-T method) that may be applied as an exception to the standard methods when certain criteria have been met. Section 777A(d)(2) of the Act discusses, for administrative reviews, the maximum length of time over which the Department may calculate weighted-average NVs when using the A-to-T method. Section 777A(d)(2) has no provision specifying the comparison method to be employed in administrative reviews.

To fill the gap in the statute, the Department promulgated regulations to specify how comparisons between NV and EP or CEP would be made in administrative reviews. With the

⁶⁶ See, e.g., *Multilayered Wood Flooring From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*; 2011-2012, 79 FR 26712 (May 9, 2014) and accompanying IDM at Comment 1A; *Seamless Refined Copper Pipe and Tube from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*; 2011-2012, 79 FR 23324 (April 28, 2014) and accompanying IDM at Comment 4; *Purified Carboxymethylcellulose from Finland: Final Results of Antidumping Duty Administrative Review*; 2011-2012, 79 FR 1826 (January 10, 2014) and accompanying IDM at 4.

⁶⁷ See *Polyethylene-Terephthalate Film, Sheet, and Strip From the United Arab Emirates: Final Results of Administrative Review*, 79 FR 24401 (April 30, 2014) (*PET Film from the UAE*) and accompanying IDM at Comment 2.

⁶⁸ *Id.*

implementation of the Uruguay Round Agreements Act (URAA), the Department promulgated 19 CFR 351.414(c)(2) (1997), which stated that the Department would normally use the A-to-T comparison method in administrative reviews. In 2010, the Department published its *Proposed Modification for Reviews*,⁶⁹ pursuant to section 123(g)(1) of the URAA. This proposal was in reaction to several World Trade Organization (WTO) Dispute Settlement Body panel reports which had found that the denial of offsets for non-dumped sales in administrative reviews to be inconsistent with the WTO obligations of the United States. When considering the proposed revisions to 19 CFR 351.414, the Department gave proper notice and opportunity to comment to all interested parties. Pursuant to section 123(g)(1)(D) of the URAA, in September 2011, the U.S. Trade Representative (USTR) submitted a report to the House Ways and Means and Senate Finance Committees which described the proposed modifications, the reasons for the modifications, and a summary of the advice which the USTR had sought and obtained from relevant private sector advisory committees pursuant to section 123(g)(1)(B) of the URAA. Also in September 2011, pursuant to section 123(g)(1)(E) of the URAA, the USTR, working with the Department, began consultations with both congressional committees concerning the proposed contents of the final rule and the final modification. As a result of this process, the Department published the *Final Modification for Reviews*.⁷⁰ These revisions were effective for all preliminary results of review issued after April 16, 2012, thereby covering this administrative review.

19 CFR 351.414(b) describes the methods by which NV may be compared to EP or CEP in less-than-fair-value investigations and administrative reviews (*i.e.*, A-to-A, T-to-T, and A-to-T). These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons, a comparison is made for each group of comparable export transactions for which the EPs, or CEPs, have been averaged together (*i.e.*, for an averaging group).⁷¹ The Department does not interpret the Act or the SAA to prohibit the use of the A-to-A comparison method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T comparison method in administrative reviews. 19 CFR 351.414(c)(1) (2012) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department determined that in both less-than-fair-value investigations and administrative reviews, the A-to-A method will be used “unless the Secretary determines another method is appropriate in a particular case.”⁷²

The Act, the SAA, and the Department’s regulations do not address the circumstances that could lead the Department to select a particular comparison method in an administrative review. Indeed, whereas the statute addresses this issue specifically with regard to investigations, the statute conspicuously leaves a gap to fill on this same question with regard to administrative

⁶⁹ See *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Proposed Rule; Proposed Modification; Request for Comment*, 75 FR 81533 (December 28, 2010) (*Proposed Modification for Reviews*).

⁷⁰ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

⁷¹ See 19 CFR 351.414(d)(2).

⁷² See 19 CFR 351.414(c)(1).

reviews.⁷³ In light of the statute's silence on this issue, the Department indicated that it would use the A-to-A method as the default method in administrative reviews but would consider whether to use an alternative comparison method on a case-by-case basis.⁷⁴ At that time, the Department also indicated that it would look to practices employed by the Department in less-than-fair-value investigations for guidance on this issue.⁷⁵

In less-than-fair-value investigations, the Department examines whether to use the A-to-T method consistent with section 777A(d)(1)(B) of the Act:

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).⁷⁶

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 to be analogous to the issue in less-than-fair-value investigations. Accordingly, the Department finds the analysis that has been used in less-than-fair-value investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review. In less-than-fair-value investigations, the Department considers an alternative comparison method to unmask dumping consistent with section 777A(d)(1)(B) of the Act.⁷⁷ Similarly, the Department considers an alternative comparison method to unmask dumping under 19 CFR 351.414(c)(1).⁷⁸ For this administrative review, the Department continues to find the consideration of an alternative comparison method to be reasonable where the statute made no provision for the Department to follow.

⁷³ See section 777A(d)(1)(B) of the Act; SAA, H.R. Doc 103-316, vol. 1 (1994), at 842-43; and 19 CFR 351.414.

⁷⁴ See *Final Modification for Reviews*, 77 FR at 8107.

⁷⁵ *Id.*, 77 FR at 8102.

⁷⁶ See section 777A(d)(1)(B) of the Act.

⁷⁷ See, e.g., *Polyethylene Retail Carrier Bags From Indonesia: Final Determination of Sales at Less Than Fair Value*, 75 FR 16431 (April 1, 2010); *Certain Stilbenic Optical Brightening Agents From Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027 (March 23, 2012); and *Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) (*Xanthan Gum from the PRC*) and accompanying IDM at 5.

⁷⁸ See, e.g., *10-11 Ball Bearings Final; Stainless Steel Plate in Coils From Belgium: Antidumping Duty Administrative Review, 2010-2011*, 77 FR 73013 (December 7, 2012); *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 65272 (October 31, 2013).

The SAA does not demonstrate that the Department may consider the application of an alternative comparison method 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) of the Act 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-to-A or T-to-T comparison methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods.”⁷⁹ Like the statute, the SAA does not limit such an examination in investigations only.⁸⁰

The silence of the statute with regard to the application of an alternative comparison method in administrative reviews does not preclude the Department from applying such a practice in this situation. Indeed, the U.S. Court of Appeals for the Federal Circuit (CAFC) 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.”⁸¹ Further, the CIT, quoting the CAFC, 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 ‘{s}o long as the {agency}’s analysis does not violate any statute and is not otherwise arbitrary and capricious.”⁸² The Department filled a gap in the statute with a logical, reasonable and deliberative comparison method for administrative reviews.

Notably, the CIT recently recognized that section 777A(d)(2) of the Act is “completely silent as to how Commerce should conduct its determination of less than fair value in reviews, leaving Commerce substantial discretion as to the methodologies it wishes to employ.”⁸³ The Court reasoned that “{i}n the light of this broad discretion, Commerce acted reasonably and did not abuse its discretion by basing its practice in reviews on its practice in investigations, which includes the use of the targeted dumping analysis.”⁸⁴ Although *Timken* was decided in the context of upholding the Department’s ability to apply an alternative comparison method based on a targeted dumping analysis pursuant to section 777A(d)(1)(B) of the Act in the context of an administrative review by looking to its practice in investigations, the Court’s rationale applies equally to consideration of an alternative comparison method based on a differential pricing analysis, as in this administrative review, which derives from the same statutory provision.

⁷⁹ See SAA, at 843 *The Use of Zeroing in Average-to-Transaction Methodology in Administrative Reviews*

⁸⁰ *Id.*

⁸¹ See *United States Steel Corp. v. United States*, 621 F.3d 1351, 1357 (Fed. Cir.2010).

⁸² See *Mid Continent Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1376-77 (CIT 2010) (quoting *U.S. Steel Group v. United States*, 96 F.3d 1352, 1362 (Fed. Cir.1996)).

⁸³ See *Timken Co. v. United States*, slip op. 2014-24 at 12 n.7 (CIT February 27, 2014)

⁸⁴ *Id.*

Comment 7: Application of a Differential Pricing Analysis

Wheatland argues that the Department should apply the A-to-T method when calculating Husteel's weighted-average dumping margin for the final results. Wheatland asserts that if the Department makes the adjustments Wheatland referenced in the rest of its case brief, then application of the A-to-T method would result in a "meaningful difference" in the margin results.

Husteel asserts that Wheatland is wrong. Husteel asserts that the Department should make none of the adjustments that Wheatland requests and thus it should continue to apply the A-to-A method because there is no meaningful difference between Husteel's weighted-average dumping margins using the A-to-A or the A-to-T methods. However, Husteel argues, if the Department does make any adjustments that would result in a meaningful difference, then the Department should not consider an alternative comparison method because there is no statutory authority to do so.

Husteel argues that the Department should continue to apply the A-to A method because the Department's analysis is unlawful since the "exception" provided for in the statute, *i.e.*, the A-to-T method, can only be applied where targeted dumping may be occurring. As explained in the SAA, the alternative comparison method provided for in section 777a(d)(1)(B) of the Act is in response to the use of the A-to-A method and the concern that such a methodology could conceal "targeted dumping."

Husteel further states that the Cohen's *d* test used in this review is deficient because it does not measure causal links, the statistical significance, or even the "significance" intended by the statute. Husteel argues that the Cohen's *d* test cannot differentiate between "targeted" or "masked" dumping and other causes which may results in prices, such as market factors, differences in production costs, or differences in materials. Further, the Cohen's *d* coefficient measures only the difference in the means of a test group and comparison group, which can be found to be large even when the variations in the prices are insignificant to the market. Lastly, the Cohen's *d* test cannot differentiate between market-driven price fluctuations and actual "targeting."

Husteel claims that "{t}argeted dumping is by definition pricing that is aberrationally low" and that a "producer is not 'targeting' a particular purchaser, region, or time period, when it is selling identical {merchandise} at *higher* prices than to the control group, and such activity cannot plausibly be said to 'mask' dumping."⁸⁵ Husteel claims that the Department's identification of sales prices above the mean as passing the Cohen's *d* test "is clearly an absurd result"⁸⁶ and that the Department should only consider the lower priced sales for purposes of applying the A-to-T method.

"Even worse," Husteel claims, the Cohen's *d* test fails to distinguish between dumped and non-dumped sales. Husteel finds this omission important because the Department has "ignored the mandate expressed in the SAA to address 'masked' or targeted dumping" with the result that

⁸⁵ See Husteel Rebuttal Brief at 15 (emphasis in the original).

⁸⁶ *Id.*

“the Department counts that higher-priced non-dumped sale{s} as evidence of targeted dumping.”⁸⁷

Lastly, Husteel claims that the Department established arbitrary thresholds in relying on the 33 percent and 66 percent cutoffs for considering whether to apply the A-to-T method.

Department’s Position: As noted in Comment 1 above, we are adjusting the costs reported by Husteel for the final results of this review. In addition, as noted in Comment 6 above, we continue to consider an alternative comparison method in this administrative review, and have applied a differential pricing analysis for each respondent to determine whether the A-to-A method is an appropriate comparison method pursuant to 19 CFR 351.414(c)(1). We address more of Husteel’s arguments regarding the differential pricing analysis applied in this review below.

We disagree with each of Husteel’s claims that the differential pricing analysis, including the Cohen’s *d* test, applied in this review is flawed or unlawful.

Husteel argues that the Cohen’s *d* test contravenes congressional intent as expressed in the Statement of Administrative Action. We disagree. The SAA expressly recognizes that the statute “provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring.”⁸⁸ As the SAA implies, the Department is not tasked with determining whether targeted dumping is, in fact, occurring. Rather, the SAA recognizes that targeted dumping may be occurring where there is a pattern of prices that differ significantly among purchasers, regions, or time periods. In our view, the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method or the T-to-T method is the appropriate tool to measure whether, and if so to what extent, a given respondent is dumping the merchandise at issue.⁸⁹ While targeting may be occurring with respect to such sales, it is not a requirement nor a precondition for the Department to otherwise determine that the A-to-T method is warranted, based upon a finding of a pattern of prices that differ significantly as provided in the statute.

19 CFR 351.414(c)(1) states that the Department “will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case.” In order to determine whether the A-to-A method is an appropriate tool with which to measure the extent of a respondent’s dumping, or whether the Department should use an alternative comparison method in a given situation, the Department looks to section 777A(d)(1)(B) of the Act, as described above in Comment 6. Section 777A(d)(1)(B)(i) of the Act requires that there exists “a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions, or periods of time.” The statute does not direct the Department how the determination of such a pattern should be accomplished and left this to the Department’s discretion. The statute simply states that a pattern of prices is one that “differs

⁸⁷ *Id.* at 15-16.

⁸⁸ *See* SAA at 843.

⁸⁹ *See* 19 CFR 351.414(c)(1).

significantly,” and the Department reasonably demonstrated that such a pattern exists in its application of the Cohen’s *d* and ratio tests in this administrative review.

The Cohen’s *d* coefficient is a statistical measure which gauges the extent (or “effect size”) of the difference between the means of two groups. In the final determination for *Xanthan Gum from the PRC*, the Department stated “Effect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone.”⁹⁰ In addressing Deosen’s comment in *Xanthan Gum from the PRC*, the Department continued:

Effect size is the measurement that is derived from the Cohen’s *d* test. Although Deosen argues that effect size is a statistic that is “widely used in meta-analysis,” we note that the article also states that “[e]ffect size quantifies the size of the difference between two groups, and may therefore be said to be a *true measure of the significance of the difference*.” The article points out the precise purpose for which the Department relies on Cohen’s *d* test to satisfy the statutory language, to measure whether a difference is significant.⁹¹

Accordingly, the Department disagrees with Husteel’s claim that the Cohen’s *d* test is not an appropriate and reasonable approach to examine whether there exists a pattern of prices that differ significantly.

The Department disagrees with Husteel’s argument that these differences must be “statistically significant.” Husteel’s claim has no basis in the statutory language, which only requires a finding of a pattern of prices that differ “significantly.” The statute does not require that the difference be “statistically significant,” only that it be significant. Husteel fails to demonstrate that the Department’s reliance on the Cohen’s *d* test, which is a generally recognized statistical measure of effect size, is unreasonable and that some higher threshold, not enumerated in the statutory language, must be satisfied. Further, as discussed above, the Cohen’s *d* test is a generally recognized measure of the significance of the differences of two means, and the Department set a threshold of “large” to provide the strongest indication that there is a significant difference between the means of the test and comparison groups.

If Congress intended to require a particular result be obtained with level of “statistical significance” of price differences as a condition for finding that there exists a pattern of prices that differ significantly, then Congress presumably would have used language beyond the stated requirement and more precise than “differ significantly” as it did, for example, with respect to enacting the sampling provision for respondent selection in section 777A(c)(2)(A) of the Act. The Department, tasked with implementing the antidumping law, resolving statutory ambiguities, and filling gaps in the statute, reasonably does not agree with Husteel’s opinion that the term “significantly” in the statute can mean only “statistically significant.” The law includes no such directive. The analysis employed by the Department, including the use of the

⁹⁰ See *Xanthan Gum from the PRC* and accompanying IDM at Comment 3, quoting from Coe, Robert, “It’s The Effects Size, Stupid: What effect size is and why it is important,” paper presented at the Annual Conference of British Educational Research Association (September 12-14, 2002).

⁹¹ *Id.*; footnote omitted; quotation from Coe, emphasis included in the IDM.

Cohen's *d* test, reasonably fills the statutory gap as to how to determine whether a pattern of prices "differ significantly."

The Department disagrees with Husteel's claim that the Cohen's *d* test must take into account any "causal links" for the identified pattern of prices that differ significantly. The statute does not include a requirement that the Department must account for some kind of causality for any observed pattern of prices that differ significantly, such as differences in market factors, production costs, or material inputs. Congress did not speak to the intent of the producers or exporters in setting EPs that exhibit a pattern of significant price differences. Nor is an intent-based analysis consistent with the purpose of the provision, as noted above, which is to determine whether averaging is a meaningful tool to measure whether, and if so, to what extent, dumping is occurring. Consistent with the statute and the SAA, the Department determined whether a pattern of significant price differences exists. Neither the statute nor the SAA requires the Department to conduct an additional analysis to account for potential reasons for the observed pattern of prices that differ significantly.

The Department agrees with Husteel's description of effect size, but disagrees with its contention that the Cohen's *d* test fails to measure the significance of the differences between the average, or mean, prices between the test and comparison groups. The examination of the price differences between test and comparison groups is relative to the "pooled standard deviation." The pooled standard deviation reflects the dispersion, or variance, of prices within each of the two groups. When the variance of prices is small within these two groups, then a smaller difference between the weighted-average sale prices of the two groups represent a more significant difference because there is less of an overlap in the prices between the test and comparison groups. When the variance within the two groups is larger (*i.e.*, the dispersion of prices within one or both of the groups is greater), then the difference between the weighted-average sale prices of the two groups must be larger in order for the difference to be significant. When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, this value is expressed in standardized units based on the dispersion of the prices within each group. This is the concept of an effect size, as represented in the Cohen's *d* coefficient.

The Department disagrees with Husteel's interpretation of the statute and the SAA that the purpose of the differential pricing analysis should be to identify "targeted dumping." Rather, as discussed above, the purpose of the application of the differential pricing analysis in this review is to determine whether the A-to-A method is appropriate tool to evaluate the extent of dumping by Husteel. The Department further disagrees with Husteel's interpretation of the statute and the SAA in that a pattern of prices that differ significantly necessarily involves only lower priced sales as these can be the only sales which are "targeted" or that higher priced sales are incapable of masking dumping. The statute does not require that the Department consider only lower-priced sales when considering whether the A-to-A method is appropriate. In our view, it is reasonable for the Department to consider sales information on the record in its analysis and to draw reasonable inferences as to what the data show. Contrary to Husteel's claim, it is reasonable for the Department to consider both lower-priced and higher-priced sales in the Cohen's *d* analysis because higher-priced sales are equally capable as lower-priced sales to create a pattern of prices that differ significantly.

Further, the statute states that the Department may apply the A-to-T method if “there is a *pattern of export prices* . . . for comparable merchandise that *differ* significantly among purchasers, regions, or periods of time,” and the Department “explains why *such differences* cannot be taken into account” using the A-to-A comparison method.⁹² The statute directs the Department to consider whether there exists a pattern of prices differ significantly. The statutory language references prices that “differ” and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that the Department consider only higher-priced sales or only lower-priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department explained that higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis.⁹³

Further, section 777A(d)(1)(B)(i) of the Act makes no provision for the comparison of the U.S. sales with NVs. Higher- or lower-priced sales could be dumped or could be masking other dumped sales. However, the relationship between higher or lower U.S. prices and their comparable NVs is not relevant in the Cohen’s *d* test and in answering the question of whether there is a pattern of prices that differ significantly because this analysis includes no comparisons with NVs and section 777A(d)(1)(B)(i) of the Act contemplates no such comparisons. By considering all sales, higher-priced sales and lower-priced sales, the Department is able to analyze an exporter’s pricing to identify whether there is a pattern of prices that differ significantly. Indeed, when greater than their NV, higher-priced sales will offset lower-priced sales when using the A-to-A method, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, which can mask dumping. Therefore, the inclusion of higher-priced sales which are found to differ significantly does not contradict the statute and may be relevant in determining whether there is the potential for masked dumping and whether the A-to-A method is appropriate for the given situation.

The Department disagrees with Husteel’s argument that it has arbitrarily set the 33 percent and 66 percent thresholds for determining the extent to which an alternative comparison method may be considered. As stated in the *Preliminary Results*, the purpose of the Cohen’s *d* test is “to evaluate the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise.”⁹⁴ When 66 percent or more of the value of a respondent’s U.S. sales are found to establish a pattern of prices that differ significantly, then the Department finds that the extent of these price differences throughout the pricing behavior of the respondent does not permit the segregation of the sales which constitute the identified pattern or prices that differ significantly from those that do not. Accordingly, the Department determines that considering the application of the A-to-T method to all U.S. sales to be reasonable. Further, when 33 percent or less of the value of a respondent’s U.S. sales constitute the identified pattern of prices that differ significantly, then the Department considers this extent of the pattern to not be significant in considering whether the A-to-A method is appropriate and has not considered the application of the A-to-T method as an alternative comparison method. When between 33 percent and 66 percent of the value of a

⁹² See section 777A(d)(1)(B) of the Act (emphasis added).

⁹³ See *Hardwood and Decorative Plywood From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013) and accompanying IDM at Comment 5.

⁹⁴ See *Preliminary Results*, and accompanying Decision Memorandum at 6.

respondent's U.S. sales constitute a pattern of prices that differ significant, the Department considers the extent of this pattern to be meaningful to consider whether the A-to-A method is appropriate, but also finds that segregating these sales from those sales which are not part of the identified pattern to be reasonable and has then only considered the application of the A-to-T method as an alternative comparison method to this limited portion of a respondent's U.S. sales. Lastly, as stated in the *Preliminary Results*, the Department invited interested parties to submit arguments and support with respect to the differential pricing analysis used in this administrative review with respect to modifying the default definitions used in the Department's approach. No such comments were received to alter the 33 percent and 66 percent cutoffs or any of the other thresholds or definitions used by the Department in the *Preliminary Results*.

Comment 8: Denial of Offsets for Non-Dumped Sales With the Average-to-Transaction Method

HYSCO argues that, even if the Department determines to make A-to-T comparisons based on a finding of differential pricing, the Department is legally prohibited from "zeroing" when making A-to-T comparisons in administrative reviews. According to HYSCO, the WTO's Dispute Settlement Body has held that the Department's zeroing practice in administrative reviews is inconsistent with Articles 2.4 and 9.3 of the WTO Antidumping Agreement and Article VI: 2 of the GATT 1994.⁹⁵

Wheatland and U.S. Steel contend that the WTO never ruled that zeroing is impermissible in cases involving patterns of significant price differences. Wheatland states that the WTO hinted that zeroing should be allowed in the targeted dumping context as a way to resolve the "mathematical equivalence" problem. That is, Wheatland claims, it would allow the "A-to-A" and the "A-to-T" methodologies to produce different results, such that the latter methodology is not rendered superfluous.⁹⁶ Wheatland claims that the WTO dispute resolution decisions have no legal effect on U.S. law (unless implemented through the procedures of the URAA), and zeroing is permissible under the A-to-T method under U.S. law. Wheatland contends that the use of the A-to-T method with zeroing is, in fact, the best way to measure the degree to which pricing patterns "mask" dumping, *i.e.*, where higher priced (non-dumped) sales offset the lower-priced (dumped) sales under the A-to-A method. Wheatland asserts that the Department rejected the same arguments now being made by HYSCO in *Welded Pipe from Turkey*.⁹⁷

Department's Position: The Department disagrees with HYSCO. HYSCO's argument, that the Department is legally prohibited from "zeroing" when making A-to-T comparisons in administrative reviews, is the same as the respondent, JISCO, in *Nails from the PRC*.⁹⁸ We found in *Nails from the PRC* that, when using the A-to-T method, the Department does not

⁹⁵ See, e.g. United States-Continued Existence and Application of Zeroing Methodology, Report of the Appellate Body, WT/DS350/AB/R (February 4, 2009).

⁹⁶ See Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, 297, WT/ds350/ab/r 2008-11 (February 4, 2009).

⁹⁷ See *Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 79665 (December 31, 2013) (*Welded Pipe from Turkey*) and accompanying IDM at Comment 9.

⁹⁸ See *Certain Steel Nails From the Peoples Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review*, 79 FR 19316 (April 8, 2014) (*Nails from the PRC*) and accompanying IDM at Comment 6.

permit negative comparison results to offset or reduce the sum of the positive comparison result when determining the dumping margin within the meaning of section 771(35)(B) of the Act.

The recent decision by the CAFC in *Union Steel* resolved the outstanding question of whether the Department's statutory interpretation is reasonable. The CAFC affirmed the Department's explanation that it may interpret the statute to permit the denial of offsets for non-dumped sales with respect to the A-to-T comparison method in administrative reviews, while permitting the Department to grant offsets for non-dumped transactions when applying the A-to-A comparison method in investigations.⁹⁹ The CAFC also affirmed the Department's explanation that it may interpret the same statutory provision differently because there are inherent differences between the comparison methods used in investigations and reviews.¹⁰⁰ Indeed, the court noted that although the Department recently modified its practice "to allow for offsets when making A-to-A comparisons in administrative reviews . . . {t}his modification does not foreclose the possibility of using the zeroing methodology when {the Department} employs a different comparison method to address masked dumping concerns."¹⁰¹

Likewise, in *United States Steel*, the CAFC sustained the Department's decision to no longer apply zeroing when employing the A-to-A comparison method in investigations while recognizing the Department's intent to continue to apply zeroing in other circumstances. Specifically, the court recognized that the Department may use zeroing when applying the A-to-T comparison method where patterns of significant price differences are found.¹⁰²

Lastly, the Department disagrees with HYSCO's proposition that the denial of offsets with the A-to-T method is inconsistent with the United States' international obligations. First, neither the WTO's Dispute Settlement Body nor the Appellate Body have issued reports regarding the denial of offsets with the application of an alternative comparison method based upon the A-to-T method as described in the second sentence of Article 2.4.2 of the WTO Antidumping Agreement. Furthermore, the CAFC held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.¹⁰³ Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.¹⁰⁴ As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute.¹⁰⁵ With regard to the denial of offsets when using an alternative comparison method based on the A-to-T

⁹⁹ See *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013) (*Union Steel*).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See *United States Steel Corporation v. United States*, 621 F. 3d at 1355 n.2, 1362-63 (Fed. Cir. 2010) (*United States Steel*). ("{T}he exception contained in 1677f-1(d)(1)(B) indicates that Congress gave {the Department} a tool for combating targeted or masked dumping by allowing {the Department} to compare weighted average normal value to individual transaction values when there is a pattern of prices that differs significantly among purchasers, regions, or periods of time.")

¹⁰³ See *Coprus Staal*; accord *Corus Staal 207*; see also the SAA at 659 ("WTO dispute settlement panels will not have any power to change U.S. law or order such a change.")

¹⁰⁴ See, e.g., 19 U.S.C. 3533, 3538.

¹⁰⁵ See, e.g., 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary).

method, the Department issued no new determination or the United States has not adopted any change to its methodology pursuant to this statutory procedure.

Comment 9: Withdrawal of the Regulations Governing Targeted Dumping in Less-Than-Fair-Value Investigations

Husteel states the Department's development and application of differential pricing methodology in this administrative review is unlawful because the rescission of the Department's previous targeted dumping regulation did not comply with the notice and comment requirement of the Administrative Procedures Act (APA). Husteel notes the targeted dumping regulations were previously codified at 19 CFR 351.414(f), then the Department withdrew this regulation in 2008.¹⁰⁶ Husteel references APA regulations that require government agencies to publish a notice of proposed rule-making and provide parties an opportunity to participate in the rule making through "submission of written data, views, or arguments," unless the agency finds this process "impracticable, unnecessary, or contrary to the public interest." Husteel reports that the Department stated that immediate revocation of its regulations was necessary because it would "act to deny relief to domestic industries suffering material injury from unfairly traded imports." Husteel contends that the Department did not substantiate these claims, and, therefore, this reason did not constitute valid "good cause" under the APA. Citing, *e.g.*, *U.S. Justice Department, Attorney General's Manual on the Administrative Procedures Act* (1947) at 30 and *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974), Husteel argues that the public interest was not served to the extent necessary, as dictated by precedent, to justify waiver of the required notice and comment procedures under the APA. Husteel also cites *Gold East Paper*,¹⁰⁷ arguing that the situation is the same and supports Husteel's argument that the withdrawal of the targeted dumping regulation violated the APO, and it was thus unlawful and ineffective. Husteel concludes that the Department should therefore apply its targeted dumping regulation if it continues to find targeted dumping.

Department's Position:

The targeted dumping regulations were properly withdrawn pursuant to the APA. During the withdrawal process, the Department engaged the public to participate in its rulemaking process. Further, the Department stated in the *2008 Withdrawal* that notice and an opportunity for public comment are not required under the APA's "good cause" exception. 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.¹⁰⁸ As the notice explained, because the Department 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 remedy provided under the statute to address masked dumping. The notice

¹⁰⁶ See *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74931 (December 10, 2008) (*2008 Withdrawal*).

¹⁰⁷ See *Gold East Paper (Jiangsu) Co., Ltd. v. United States*, 918 F. Supp. 2d 1317 (CIT 2013).

¹⁰⁸ See *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 FR 60651 (October 25, 2007).

posed specific questions and allowed the public 30 days to submit comments, which various parties submitted.¹⁰⁹

After considering those comments, the Department published a proposed new methodology in May 2008 and again requested public comment.¹¹⁰ Among other things, the Department specifically sought comments “on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping.”¹¹¹ Several of the submissions¹¹² received from parties explained that the Department’s proposed methodology was inconsistent with the statute and should not be adopted.¹¹³ Moreover, several entities explicitly stated that the Department should not establish minimum thresholds for accepting allegations of targeted dumping because the statute contains no such requirements.¹¹⁴

These comments suggested that the regulation was impeding the development of an effective remedy for masked dumping. Indeed, after considering the parties’ comments the Department explained that because “the provisions were promulgated without the benefit of any experience on the issue of targeted dumping, the Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping.”¹¹⁵ For this reason, the Department determined that the regulation had to be withdrawn.¹¹⁶ Although this withdrawal was effective immediately, the Department again invited parties to submit comments, and gave them a full 30 days to do so.¹¹⁷ The comment period ended on January 9, 2009, with several parties submitting comments.¹¹⁸

The course of the Department’s decision-making demonstrates that it actively sought to engage the public. This type of public participation is fully consistent with the APA’s notice-and-comment requirement.¹¹⁹ Moreover, various courts rejected the idea that an agency must give

¹⁰⁹ *Id.*; see also Public Comments Received December 10, 2007, Department of Commerce, <http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html> (December 10, 2007) (listing the entities that commented).

¹¹⁰ See *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Duty Investigations; Request for Comment*, 73 FR at 26371-2 (May 9, 2008).

¹¹¹ *Id.*

¹¹² The public comments received on June 23, 2008, and submitted on behalf of several domestic parties can be accessed at:

<http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html>.

¹¹³ See, e.g., Letter from Kelley, Drye and Warren to the Department: “Comments on Targeted Dumping Methodology, Comments,” (Letter from Kelley Drye) (June 23, 2008) at 2.

¹¹⁴ See, e.g., Letter from Committee to Support U.S. Trade Laws, to the Department: “Comments on Targeted Dumping Methodology” at 25; see also Letter from Kelley Drye at 29.

¹¹⁵ See *2008 Withdrawal*.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See Public Comments received January 23, 2009, available at <http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html> (January 23, 2009) (listing the entities that commented).

¹¹⁹ See, e.g., *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000), *cert denied* 532 U.S. 970 (U.S. 2001) (holding that the Environmental Protection Agency’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).

the parties an opportunity to comment before every step of regulatory development.¹²⁰ 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, as a whole, acted in a way that is consistent with the statute's purpose.¹²¹ 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 of the APA.

The APA does not require that a final rule that the agency promulgates must be identical to the rule that it proposed and upon which it solicited comments.¹²² 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.

Further, even if the two rounds of comments that the Department solicited before the withdrawal of the regulation were insufficient to satisfy the APA's requirements, the Department properly declined to solicit further comments pursuant to the APA's "good cause" exception. This 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."¹²³ The CAFC 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.¹²⁴ In *National Customs Brokers*, the CAFC rejected a plaintiff's argument that the U.S. Customs Service failed to follow properly the APA in promulgating certain interim regulations when it had published these regulations without giving the parties a prior opportunity to comment. Moreover, although the U.S. Customs Service solicited comments on the published regulations, it 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.¹²⁵ The U.S. Customs Service explained that "good cause" existed to not 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."¹²⁶ The Court recognized that this explanation was a proper invocation of the "good cause" exception and explained that soliciting and considering comments was *both*

¹²⁰ 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).

¹²¹ *Id.*

¹²² See, e.g., *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

¹²³ See 5 U.S.C. 553(b)(B).

¹²⁴ See, e.g., *National Customs Brokers and Forwarders Ass'n of Am., Inc. v. United States*, 59 F.3d 1219, 1223 (Fed. Cir. 1995) (*National Customs Brokers*).

¹²⁵ *Id.*, 59 F.3d at 1220–21.

¹²⁶ *Id.*, 59 F.3d at 1223.

unnecessary “*and* contrary to the public interest because the public would benefit from the amended regulations.”¹²⁷ For this reason, the Court affirmed the regulation against the plaintiff’s challenge.¹²⁸

The regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy 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, the Department determined not to base its analysis in the instant proceeding upon the withdrawn regulation.¹²⁹

RECOMMENDATION

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

AGREE _____ DISAGREE _____

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

Date

¹²⁷ *Id.*, 59 F.3d at 1224 (emphasis added).

¹²⁸ *Id.*

¹²⁹ As a result of the withdrawal of the targeted dumping regulation, we note that the Department no longer requires the petitioners to submit an allegation of targeted dumping before conducting its analysis.