




A-580-871
Investigation
07/01/2012-06/30/2013
Public Document
E&C VI: MF

September 24, 2014

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Gary Taverman 
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative
Determination in the Less-Than-Fair-Value Investigation of Grain-
Oriented Electrical Steel from the Republic of Korea

SUMMARY

The Department of Commerce (the Department) analyzed the comments submitted by the petitioners and a domestic interested party,¹ jointly, and the mandatory respondent, POSCO,² in the less-than-fair-value (LTFV) investigation of grain-oriented electrical steel (GOES) from the Republic of Korea (Korea). We recommend making changes to the *Preliminary Determination* for the final determination in accordance with the positions described in the "Discussion of the Issues" section of this memorandum.

BACKGROUND

The Department published the *Preliminary Determination* in the *Federal Register* on May 12, 2014.³ The period of investigation (POI) is July 1, 2012, through June 30, 2013. Between May 25, 2014, and June 20, 2014, the Department conducted sales and cost verifications of POSCO in Korea.

¹ The petitioners are AK Steel Corporation, Allegheny Ludlum, LLC, and the United Steelworkers. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America has participated in this investigation as a domestic interested party. These parties (collectively, the "domestic parties") have made joint submissions in this investigation.

² The mandatory respondent is POSCO.

³ See *Grain-Oriented Electrical Steel from the Republic of Korea: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 26939 (May 12, 2014) (*Preliminary Determination*).



In accordance with 19 CFR 351.309(c)(1)(i), we invited parties to comment on our *Preliminary Determination*. On August 4, 2014, and August 11, 2014, domestic parties and POSCO submitted case and rebuttal briefs.⁴

On June 11, 2014, POSCO requested a public hearing.⁵ On August 7, 2014, POSCO withdrew its request for a public hearing.⁶

DISCUSSION OF THE ISSUES

Comment 1: Use of Export Price *versus* Constructed Export Price

POSCO classified its U.S. sale prices as constructed export prices (CEP), and maintained that the Department's decision to treat these sales as export price (EP) transactions is contrary to the Department's own established practice and contravenes the statute. POSCO expressed the view that the Department's determination contradicts its prior decisions on the same issue in nearly identical situations (and in some instances involving some of the same parties).⁷

POSCO argued that the Department has explicitly stated that a producer's knowledge that subject merchandise was destined for sale to its own U.S. affiliate requires a finding of CEP sales, citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Korea*, 67 FR 62124 (October 3, 2002), and accompanying Issues and Decision Memorandum at comment 1 (*Cold-Rolled Steel from Korea*).⁸ POSCO asserted that where a producer or exporter knows at the time of sale that an unaffiliated customer will sell the subject merchandise to an affiliated party of itself, the Department has consistently declined to rely on the initial sale to the unaffiliated customer in its dumping analysis. POSCO averred that in *Cold-Rolled Steel from Korea*, "the Department addressed a situation nearly identical to the present case, where respondent POSCO sold subject merchandise to an unaffiliated trading company that in turn sold the subject merchandise to POSCO's U.S. subsidiary, POSAM {and} POSAM then sold the subject merchandise to an unaffiliated customer."⁹ POSCO commented that the Department classified POSCO's U.S. sales in *Cold-Rolled Steel from Korea* as CEP transactions because POSCO knew at the time of

⁴ These submissions are: (1) the letter from POSCO to the Secretary of Commerce entitled, "Grain-Oriented Electrical Steel from the Republic of Korea: Case Brief," dated August 4, 2014 (POSCO's Case Brief); (2) the letter from domestic parties to the Secretary of Commerce entitled, "Investigation of Grain-Oriented Electrical Steel from the Republic of Korea: Domestic Parties' Case Brief," dated August 4, 2014 (Domestic Parties' Case Brief); (3) the letter from POSCO to the Secretary of Commerce entitled, "Grain-Oriented Electrical Steel from the Republic of Korea: Rebuttal Brief," dated August 11, 2014 (POSCO's Rebuttal Brief); and (4) the letter from domestic parties to the Secretary of Commerce entitled, "Grain-Oriented Electrical Steel from Korea: Domestic Parties' Rebuttal Brief," dated August 11, 2014 (Domestic Parties' Rebuttal Brief).

⁵ See the letter from POSCO to the Secretary of Commerce entitled, "Grain-Oriented Electrical Steel from the Republic of Korea: Request for Public Hearing," dated June 11, 2014.

⁶ See the letter from POSCO to the Secretary of Commerce entitled, "Grain-Oriented Electrical Steel from the Republic of Korea: Withdrawal of Request for Hearing," dated August 7, 2014.

⁷ See POSCO's case brief at 2-3.

⁸ *Id.* at 3-4.

⁹ *Id.* at 4.

the sale of subject merchandise that the merchandise would ultimately be sold to POSAM by the unaffiliated trading company.

POSCO also submitted that the Department found that the sale to an unaffiliated reseller was an inappropriate basis to determine U.S. sales price when the sale price between the producer and an unaffiliated reseller was not a negotiated price and the unaffiliated reseller had knowledge that the subject merchandise would be sold to the producer's/exporter's affiliate, citing *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from Indonesia*, 72 FR 30753, 30755 (June 4, 2007) (Preliminary); unchanged in 72 FR 60636 (October 25, 2007) (*Paper from Indonesia*).¹⁰ POSCO noted that the respondent in that case sold subject merchandise to an unaffiliated trading company located in a third country that subsequently invoiced the products to the respondent's affiliated trading company. POSCO claimed that the Department used the downstream sales price from the respondent's affiliated trading company in the margin calculations instead of the respondent's sales price to the unaffiliated trading company. POSCO argued that the Department stated that the transactions with the unaffiliated trading company were not the relevant sales because (1) the respondent did not negotiate sales prices with the unaffiliated trading company and (2) the respondent knew that the next party in the sales process was affiliated with the respondent.

POSCO claimed that if the producer or exporter does not know at the time of sale that its unaffiliated customer will sell the subject merchandise to an affiliate of the exporter or producer, then the Department uses the price from the exporter or producer to the unaffiliated customer as the starting price for the sale, citing *Silicon Metal from Brazil: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent To Revoke Order in Part*, 67 FR 51539 (August 8, 2002) (Preliminary); unchanged in *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review and Revocation of Order in Part*, 67 FR 77225 (December 17, 2002) (*Silicon Metal*).¹¹ POSCO stated that the respondent sold subject merchandise to unaffiliated trading companies, which then sold the merchandise to the respondent's affiliate. According to POSCO, the Department determined that the record did not establish that, at the time of sale to the unaffiliated trading companies, respondent had knowledge that this merchandise would ultimately be purchased by its affiliate, and, consequently, the Department treated respondent's sales to unaffiliated trading companies as the relevant sales for the margin calculation.

POSCO argued that its U.S. sales in this investigation are consistent with *Cold-Rolled Steel from Korea* and *Paper from Indonesia*, where the Department found that the producer's sales to an unaffiliated customer cannot be the relevant sale for the margin calculations when the producer knows that the unaffiliated customer will resell the subject merchandise to the producer's U.S. affiliate. POSCO claimed that its sales process for GOES "is nearly identical" with that in *Cold-Rolled Steel from Korea* and that "the only difference is the inclusion of one additional affiliated party, i.e., AAPC, at the end of the sales process."¹² POSCO averred that because it knew at the time of sale to the unaffiliated party that the unaffiliated party would sell the subject merchandise to POSCO's affiliate in the United States, the cases are "identical" in that POSCO knew at the

¹⁰ *Id.* at 4-5.

¹¹ *Id.* at 5.

¹² *Id.* at 6.

time of its sales to the unaffiliated trading company that the latter would sell the merchandise to a POSCO affiliate in the United States. POSCO commented that there is no reason for the Department to depart from its previous practice when the facts of the instant investigation “essentially mirror” those in *Cold-Rolled Steel from Korea*.¹³

POSCO submitted that sales to its unaffiliated customer in Korea cannot be an appropriate basis to determine the U.S. sales price because they are not negotiated prices. POSCO claimed that each sale to its unaffiliated customer in Korea consisted of “little more than a transfer price to POSAM,” where its unaffiliated customer in Korea obtains a small “fixed profit margin ... for the limited services it provides in the sales process between POSCO’s affiliates and the unaffiliated U.S. customer.”¹⁴ POSCO contended that it and its unaffiliated customer in Korea do not negotiate prices, and that there are no additional market factors that influence POSCO’s profit margin from its unaffiliated customer in Korea. POSCO argued that the only sales negotiation in the entire sales process is the price and quantity negotiation between AAPC and the unaffiliated U.S. customer, such that AAPC’s sale to the unaffiliated U.S. customer is the only relevant sale for the purpose of determining the U.S. sales price.

POSCO claimed that treatment of its U.S. sales as CEP transactions is consistent with the statute because the Department uses the U.S. sales price (or the sales price of an arm’s-length transaction between the foreign producer and an unaffiliated U.S. purchaser) as the starting point of its dumping calculation. POSCO argued that pursuant to section 772 of the Tariff Act of 1930, as amended (the Act), if the producer or exporter sells directly to the unaffiliated U.S. purchaser, then that sale is used to calculate the U.S. price and is classified as an EP sale, but if the first sale to an unaffiliated purchaser occurs in the United States, then that sale is used to calculate the U.S. price and is classified as a CEP sale.¹⁵ POSCO stated that the critical difference between classification as an EP or a CEP sale is “whether the sale or transaction takes place inside or outside the United States and whether it is made by an affiliate,” citing *AK Steel Corporation v. United States*, 226 F. 3d 1361, 1370 (Fed. Cir. 2000) (*AK Steel*).¹⁶ POSCO maintained that if a sale occurs in the United States and is made by a seller affiliated to the exporter or producer, that sale must be classified as a CEP sale. POSCO further cited *AK Steel* to argue “the plain language of the EP definition precludes classification of a sale between two U.S. entities (*i.e.*, a U.S. affiliate of the producer and a U.S. purchaser) as an EP sale.”¹⁷ POSCO argued that under the statute CEP sales may include sales made by either the producer or exporter, or by the affiliate of the producer or exporter, but EP sales can only be made by the producer or exporter. POSCO quoted *AK Steel* to argue that the Department must find CEP sales when there are “contracts showing that the sales at issue took place in the United States between two entities with United States addresses, one of which was an affiliate of the producer/exporter,” because “it is contrary to the plain meaning of the statute for Commerce to nevertheless ... define the sales as effectively occurring outside of the United States and thus EP sales rather than CEP sales.”¹⁸ POSCO also noted the CAFC stated that “if Congress had

¹³ *Id.*

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 8.

¹⁶ *Id.*

¹⁷ *Id.* at 8-9.

¹⁸ *Id.* at 9, quoting *AK Steel* at 1371.

intended for Commerce to use its discretion to determine whether the use of CEP or EP was appropriate, it would have explicitly left that task to the agency as it did with other calculations in the statute.”¹⁹ POSCO concluded, therefore, that because the U.S. sales took place in the United States and were made by a U.S. affiliate of POSCO, the statute mandates the Department treat the sales as CEP sales.

POSCO asserted that the Department must examine the totality of the circumstances surrounding the U.S. sales process, and assess where the reviewed sales or agreements of sale were made for purposes of section 772(b) of the Act, citing *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 53370, 53373 (September 11, 2006) (*Corrosion-Resistant Carbon Steel from Korea*). POSCO averred that the key element to consider is when (and thus where and between which parties) the material terms of sale (*i.e.*, price and quantity) are established, citing *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 79 FR 18366 (April 11, 2005), and accompanying Issues and Decision Memorandum at comment 2. POSCO stated that pursuant to section 772 (a)-(b) of the Act, the Department may examine the price at which the subject merchandise is agreed to be sold, not simply when it is first sold.

POSCO commented that to determine when a sale has occurred for purposes of classifying sales as EP or CEP, the material terms of sale pertain to the terms of sale that are applied to the U.S. customer, citing *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 FR 22146, 22148, 22149 (May 3, 2001) (*Hot-Rolled Steel from the Netherlands 2001*). POSCO argued that *Hot-Rolled Steel from the Netherlands* demonstrates that a sale has occurred when the seller “provides the final written confirmation of the agreement, setting forth the agreed prices and quantities, to the U.S. customer.”²⁰ POSCO submitted that the Department has looked to the role of the party that established the material terms of sale to the U.S. customer when selecting the relevant sale to calculate U.S. sales price. POSCO pointed to a review in which the Department found that the relevant sale for the determination of U.S. sales price was that by a U.S. affiliate when it (a) conducted all sale negotiations with and received purchase orders from U.S. customers, (b) sent order confirmations to the U.S. customers, and (c) issued all invoices and received payment from its U.S. customers, citing *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Malleable Iron Pipe Fittings From the People’s Republic of China*, 68 FR 33911, 33016 (June 6, 2003), unchanged in *Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People’s Republic of China*, 68 FR 61395 (October 28, 2003).²¹ POSCO claimed that the Department also found CEP sales when the U.S. affiliate (a) took title to the subject merchandise, (b) invoiced and collected payment from the unaffiliated U.S. customer, and (c) played a role in determining the U.S. price, citing *Stainless Steel Sheet and Strip in Coils From Italy: Final Results of Antidumping Duty Administrative Review*, 67 FR 1715 (January 14, 2002), and accompanying Issues and Decision Memorandum at comment 1.²²

¹⁹ *Id.*

²⁰ *Id.* at 10.

²¹ *Id.* at 11.

²² *Id.*

POSCO contrasted the determinations above, where the Department found EP sales when a party located outside of the United States had established the material terms of sale, with the U.S. customer and had issued sales contracts, invoices, and shipping documents directly to the U.S. customer, citing *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Metal From the Russian Federation*, 68 FR 6885 (February 11, 2003), and accompanying Issues & Decision Memorandum at comment 14.²³ POSCO also contrasts the determinations above with one in which the Department found EP sales when the unaffiliated resellers negotiated their own sales with end users without the involvement of the manufacturer, citing *Notice of Final Determination of Sales at Not Less Than Fair Value: Expandable Polystyrene Resins from the Republic of Korea*, 65 FR 69284 (November 16, 2000), and accompanying Issues and Decision Memorandum at comment 6.²⁴

POSCO asserted that it “is clear from the record that its unaffiliated customer in Korea plays little to no role in establishing the material terms of sale.” POSCO reiterated that the only sale in which price and quantity terms are negotiated is the sale between AAPC and the unaffiliated U.S. customer. POSCO stated that AAPC: (i) interacts directly with the unaffiliated U.S. customer (including negotiation of material terms of sale); (ii) receives the unaffiliated U.S. customer’s orders; (iii) places the corresponding orders with POSAM; (iv) arranges U.S. inland freight; (v) takes title to the merchandise; and (vi) issues invoices to the ultimate customer. POSCO contended that the material terms of sale are memorialized in the purchase order from the unaffiliated U.S. customer to AAPC. POSCO argued that, once it completes production, the subject merchandise is shipped directly from its factory to AAPC.²⁵ POSCO claimed that it is only after the material terms of sale have been set between AAPC and the unaffiliated U.S. customer that there is any transaction constituting a sale between POSCO and its unaffiliated customer in Korea. POSCO reiterated that the role of the unaffiliated customer in Korea throughout the process is “minimal” and has no bearing on the material terms of sale between AAPC and the unaffiliated U.S. customer. POSCO stated that the role of the unaffiliated customer in Korea is limited to conveying POSAM’s order for a given quantity of product to POSCO, transferring certain documents between POSCO and POSAM, handling export customs clearance, and transferring its price from POSCO to POSAM with a fixed mark-up for its limited services.²⁶

Domestic parties stated that, contrary to POSCO’s claims, the Department’s treatment of the U.S. sales by POSCO as CEP transactions in a prior proceeding, *Cold Rolled Steel from Korea* (which involved an entirely different class or kind of merchandise and a different unaffiliated U.S. customer), does not warrant a similar treatment in the instant investigation.²⁷ According to domestic parties, the Department must make its determination based on the record evidence in this proceeding and that the Department has stated explicitly that it is not precluded from classifying a respondent’s sales differently from one proceeding to another, citing *Certain Cold-*

²³ *Id.*

²⁴ *Id.* at 11-12.

²⁵ *Id.* at 12 (citing POSCO’s December 30, 2013, section A response (section A response) at A-22-A-32).

²⁶ *Id.* (citing section A response at 2 and POSCO’s March 12, 2014, supplemental section A, B, C response (POSCO’s first supplemental response) at 2 and 33-34).

²⁷ See Domestic Parties’ Rebuttal Brief at 4.

Rolled Carbon Steel Flat Products From the Netherlands: Final Results of Antidumping Duty Administrative Review, 65 FR 13362 (March 6, 2000), and accompanying Issues and Decision Memorandum at comment 1. The facts in *Cold-Rolled Steel from Korea*, the domestic parties aver, are readily distinguishable from the instant investigation. Domestic parties declared that there was no evidence the Korean trading company at issue in *Cold-Rolled Steel from Korea* was involved in the U.S. sales process to the same extent as POSCO's unaffiliated customer in Korea is in the present investigation, since when AAPC receives an order from the U.S. consumer, it places an order with POSAM -- which places an order with POSCO's unaffiliated customer in Korea, which then places the order with POSCO. Domestic parties also noted that POSCO's unaffiliated customer in Korea sometimes performed another significant sales function.²⁸

In the domestic parties' view, POSCO's duty drawback documents in *Cold-Rolled Steel from Korea* list POSAM as the buyer of the merchandise, whereas in the instant investigation POSCO's duty drawback documents do not list POSAM as the buyer of the merchandise.²⁹

Domestic parties averred that, unlike in *Cold-Rolled Steel from Korea*, the record of this proceeding demonstrates that the U.S. sale occurred outside the United States. Domestic parties also note that an additional factor characterizing POSCO's unaffiliated customer in Korea and the unaffiliated U.S. customer is pertinent in the context of this analysis.³⁰

Domestic parties stated that there is no documentation on the record of this investigation to support POSCO's contention that AAPC negotiated prices with the unaffiliated U.S. customer. POSCO's statement that "no documents (*e.g.*, contracts) or correspondence that memorializes the agreed-upon price structure exist between AAPC and {the unaffiliated U.S. customer}" was quoted by domestic parties.³¹ Domestic parties contended that the only documentation associated with U.S. sales on the record (other than invoices from POSAM to AAPC and from AAPC to the unaffiliated U.S. customer) are those generated by POSCO, and do not reference AAPC.³² According to domestic parties, the only documentation POSCO provides to support its contention that AAPC negotiated prices with the unaffiliated U.S. customer is a worksheet generated for the investigation showing price schedules. Domestic parties claimed that this demonstrated that the prices allegedly negotiated by AAPC are POSCO's recommended prices. As stated by domestic parties, verification documents indicate that POSCO did not negotiate the sales with the unaffiliated U.S. customer. Domestic parties maintained that the record evidence establishes that AAPC did not negotiate prices with the unaffiliated U.S. customer, but merely relayed the prices quoted by POSCO to POSCO's unaffiliated customer in Korea.³³

Domestic parties expressed the view that POSCO's reliance on *Paper from Indonesia* is misplaced because there is nothing on this investigation's record to indicate that any party other than POSCO negotiated its sales prices.³⁴ According to domestic parties, POSCO's claim that its

²⁸ Due to the business proprietary nature of the information, *see* POSCO's section A response at 23, footnote15; *see also* Sales Verification Report at 42.

²⁹ Due to the business proprietary nature of the information, *see* Domestic Parties' Rebuttal Brief at 4-5.

³⁰ Due to the business proprietary nature of the information, *see* Domestic Parties' Rebuttal Brief at 4-5.

³¹ *Id.*

³² *Id.* at 6.

³³ Due to the business proprietary nature of the information, *see id.* at 6-7.

³⁴ *Id.* at 7.

sale to the unaffiliated customer in Korea cannot be the appropriate starting point for the dumping analysis is meritless.

Domestic parties stated that, contrary to POSCO's claim, the Department's reliance on POSCO's price as invoiced to its unaffiliated customer in Korea is consistent with the plain meaning of section 772(b) of the Act. Citing the Statement of Administrative Action (SAA), the domestic parties pointed to references to section 772(b), which states that "{i}f the first sale to an unaffiliated purchaser in the United States, or to an unaffiliated purchaser for export to the United States, is made by the producer or exporter in the home market prior to the date of importation, then Commerce will base its calculation on export price."³⁵ Domestic parties maintained that both the statute and the SAA expressly contemplate EP classification of sales where the subject merchandise is first sold outside of the United States to an unaffiliated purchaser for exportation to the United States. POSCO's section A response was quoted by domestic parties to show the sales process in which: (1) POSCO issued an invoice to its unaffiliated customer in Korea; (2) POSCO's unaffiliated customer in Korea then issued an invoice to POSAM; (3) POSAM then issued an invoice to AAPC; and (4) AAPC then issued an invoice to the unaffiliated U.S. customer. Domestic parties argued that POSCO acknowledges that it first sold subject merchandise to its unaffiliated customer in Korea for export to the United States, with all parties aware that the subject merchandise would be shipped to its affiliated U.S. resellers (POSAM and AAPC) for sale to the unaffiliated U.S. customer. Given these facts, domestic parties declared that the Department reached a proper preliminary determination that POSCO's sale to POSCO's unaffiliated customer in Korea is the appropriate U.S. sale for its dumping analysis.³⁶

Domestic parties asserted that the Department has held in a case involving a sale by a respondent through an affiliated U.S. importer that affiliation does not require a finding that the sales in question are CEP transactions under *AK Steel and Corus Staal B.V. v. United States Department of Commerce*, 259 F. Supp. 2d 1253, 1259 (Ct. Int'l Trade 2003), because the salient issue is the location of the sale rather than the role played by the affiliated importer, citing *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 Issues and Decision Memorandum at comment 22.³⁷ The contention of domestic parties was that this case found that if a sales contract was executed in the United States and title passed in the United States, then the sale must be classified as CEP, but if the sales at issue take place outside the United States, then the sales are classified as EP sales.³⁸ Domestic parties averred that POSCO's contention that "a sale made by a U.S. affiliate of the producer/exporter can only be CEP," without regard to the location of the transaction, is, according to the Court of International Trade, "a major overstatement," citing *Nucor Corp. v. United States*, 33 CIT 207, 221, 612 F. Supp. 2d 1264, 1278 (2009).³⁹

³⁵ *Id.* at 8; *see also* Statement of Administrative Action, Uruguay Round Agreements Act, H. Doc. No. 316, Vol. 1, 103d Cong. (1994) (SAA).

³⁶ *Id.* at 8-9.

³⁷ *Id.* at 10-11.

³⁸ *Id.*

³⁹ *Id.* at 11.

Domestic parties commented that POSCO made the sales to its unaffiliated customer in Korea prior to the date of importation. It was reiterated by domestic parties that the prices allegedly negotiated by AAPC are POSCO's recommended prices and that POSCO maintained ultimate control over the terms of all the U.S. sales at issue in this investigation.

Domestic parties contended, therefore, that the record demonstrates that the first sale to an unaffiliated purchaser was made by POSCO outside of the United States and prior to importation of the subject merchandise into the United States. The fact that the record contains no sales documentation or sales contract executed in the United States prior to POSCO's sale to POSCO's unaffiliated customer in Korea was reiterated by domestic parties. Domestic parties argued that POSCO made all sales outside the United States, and that AAPC's role was limited to that of a facilitator for the movement and delivery of the merchandise.⁴⁰

According to domestic parties, should the Department decide to classify POSCO's U.S. sales as CEP sales, the Department cannot rely on POSCO's CEP sales database because it was not thoroughly verified. Domestic parties claimed that, because POSCO elected not to make company officials from POSAM and AAPC available during the Department's verification, there was no means for the Department to verify the CEP sales process, including obtaining answers to critical questions concerning AAPC's role in setting prices to the unaffiliated U.S. customer. Domestic parties state POSCO provided only limited CEP sales information at the verification in Korea, and that the Department's review of that information was limited as well. Domestic parties stated that there was no verification of POSCO's Section E response, which would be used in the Department's margin calculation using CEP prices.⁴¹

Department's Position:

The statute provides two definitions for U.S. price:

(a) Export Price

The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States...

(b) Constructed Export Price

The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter ...

See section 772(a)-(b) of the Act.

⁴⁰ *Id.* at 12.

⁴¹ *Id.* at 12-13.

Contrary to POSCO's claim, the record lacks evidence that the first sale (or agreement to sell) to an unaffiliated purchaser occurred in the United States between AAPC and the unaffiliated U.S. customer. We asked POSCO for all documentation of such transactions, to which POSCO responded "...no documents (*e.g.*, contracts) or correspondence that memorializes the agreed-upon price structure exist..." for these sales.⁴² POSCO stated that the "...individual purchase order is the first document where the agreed-upon price appears, although {the unaffiliated U.S. customer} does not always issue formal purchase orders for transactions because it sometimes transmits an order via e-mail or telephone."⁴³ Despite this explanation, POSCO did not provide a single example or point to a piece of record evidence of such a purchase order, nor did it provide any examples of e-mails containing such order information. Rather, other than invoices from AAPC to the unaffiliated U.S. customer, POSCO provided only a worksheet showing the price schedules for the POI.⁴⁴ This worksheet reflected a "starting point" for prices which was the same as those set by POSCO in the home market, including to the unaffiliated Korean trading company.⁴⁵ POSCO provided no documentation of negotiations between AAPC and the unaffiliated U.S. customer in the sales documentation presented at verification. Although POSCO has not failed to place evidence on the record for *all* of the activities it contends that AAPC performs, record evidence does not support the full extent of POSCO's claims. There is evidence that AAPC places the corresponding orders with POSAM, arranges U.S. inland freight, and issues invoices to the ultimate customer.⁴⁶ Though there is no documentation that AAPC takes title to the merchandise as POSCO claims,⁴⁷ this point alone is not determinative. POSCO rests its argument on alleged negotiation and customer orders, yet there is no record evidence to support these contentions; this we find much more determinative.⁴⁸

Although some of the sales and shipment documentation generated by POSCO⁴⁹ refers to POSAM, AAPC, and the unaffiliated U.S. customer, this information (in conjunction with POSCO's shipment of the merchandise directly to AAPC) confirms no more than that the merchandise is known to be for exportation to the United States and intended for ultimate sale to the unaffiliated U.S. customer.⁵⁰ POSCO claimed that the invoice date is the date of sale for that ultimate transaction between AAPC and the unaffiliated U.S. customer.⁵¹ This date is months after POSCO invoices the unaffiliated customer in Korea and ships the merchandise from Korea

⁴² See POSCO's first supplemental response at 3.

⁴³ *Id.*

⁴⁴ *Id.* at Exhibit S-1.

⁴⁵ *Id.*; see also Domestic Parties' Rebuttal Brief at 5-6.

⁴⁶ See, *e.g.*, POSCO's section A response at Exhibit A-12; see also Sales Verification Report at 40-41.

⁴⁷ See POSCO's section A response at A-11.

⁴⁸ In *Cold-Rolled Steel from Korea*, transfer of title was considered among all the other circumstances of the transactions, as we do here. However, there is no evidence on the record of this investigation documenting such transfer of title. While title may have passed from AAPC to the unaffiliated U.S. customer as POSCO maintained, we have no indication of where else along the chain of transactions title may have passed; therefore, transfer of title cannot be determinative here. In this investigation, we focus on the points repeatedly stressed by POSCO in its case brief, those of customer orders and especially negotiations.

⁴⁹ See, *e.g.*, the section A response at Exhibit A-12 (the sample U.S. sale documents at each stage of the series of transactions); see also Sales Verification Report at 40-41 (first U.S. sales trace).

⁵⁰ See POSCO's December 30, 2013, section A response at A-22 (POSCO had knowledge that its sales are destined for the United States and ships the products directly to AAPC).

⁵¹ See POSCO's January 30, 2014, section C response at C-17-C-18.

to the United States.⁵² Even if the semi-annual price schedules were negotiated between AAPC and the unaffiliated U.S. customer (which the record does not establish), no sales could take place unless the materials terms of sale (which include quantity) were set. In fact, the record contains no evidence that quantities were set between AAPC and the unaffiliated U.S. customer prior to POSCO's invoicing of the unaffiliated customer in Korea, or that AAPC and the unaffiliated U.S. customer reached agreements for merchandise to be sold prior to the sales by POSCO to its unaffiliated customer in Korea. In short, the record evidence does not establish the extent of the negotiations between AAPC and the unaffiliated U.S. customer which might have occurred prior to the finalization of all material terms of the sale by POSCO to the unaffiliated customer in Korea.

Silicon Metal is distinguishable from the instant investigation in that the Department found that the absence of producer knowledge that merchandise sold to an unaffiliated customer would be resold to an affiliate of the producer justified basing the Department's analysis upon the sale to the unaffiliated customer rather than the subsequent resale by the producer's U.S. affiliate. In this investigation, as in *Cold-Rolled Steel from Korea*, POSCO had knowledge that the sales to the unaffiliated Korean trading company were destined for its U.S. affiliate POSAM.

In *Cold-Rolled Steel from Korea*, the Department relied upon the producer's knowledge and cited *Silicon Metal* as precedent.⁵³ The facts of this case are distinguishable from *Cold-Rolled Steel from Korea*. In this investigation, the relationship between POSCO's unaffiliated customer in Korea and the unaffiliated U.S. customer differentiates the chain of sales in this investigation from that in *Cold-Rolled Steel from Korea*.⁵⁴ Additionally, no evidence from the record of *Cold-Rolled Steel from Korea* indicates that the unaffiliated trading company in the United States submitted orders at the prevailing price offered by the producer in the home market, while such evidence exists with respect to GOES in this investigation.⁵⁵ Moreover, as explained above, there is insufficient record evidence to explain AAPC's role in the sale process such that its transactions with the unaffiliated U.S. customer should be the basis for the dumping margin calculations. What the record does demonstrate is that POSCO's sales to the unaffiliated customer in Korea preceded those made by AAPC to the unaffiliated U.S. customer.⁵⁶ As was stated in *USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1318 n. 9 (CIT 2003) (quoting *Taiwan Semiconductor Mfg. Co., Ltd. v. United States*, 143 F. Supp. 2d 958, 966 (CIT 2001)),

⁵² "The invoice that AAPC issues to the unaffiliated U.S. customer occurs two or three months after the date of shipment from Korea." See POSCO's section A response at 30.

⁵³ See *Cold-Rolled Steel from Korea* at Comment 1.

⁵⁴ Due to the business proprietary nature of the information, see Final Analysis Memorandum at 2 (footnote 2) to compare the elaborate chain of transactions in the instant investigation to the sales chain description in *Cold-Rolled Steel from Korea* (see *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Korea*, 67 FR 31225, 31227-28 (May 9, 2002), at discussions of "Export Price" and "Constructed Export Price," unchanged in *Cold-Rolled Steel from Korea*; see also page 7 above and the reference to the "additional factor" of this relationship described in Domestic Parties' Rebuttal Brief at 4.

⁵⁵ See POSCO's Apr. 9, 2014 section A,B,C supplemental response (POSCO's second supplemental response) at 5 and Exhibit 3 (the price schedule between POSCO and a certain unaffiliated home market customer during the POI) compared with POSCO's first supplemental response at 3 and Exhibit S-1 (the price schedule between AAPC and the unaffiliated U.S. customer during the POI); see also summary of these data at Domestic Parties' Rebuttal Brief at 6-7.

⁵⁶ See POSCO's section A response at 30: "The invoice that AAPC issues to the unaffiliated U.S. customer occurs two or three months after the date of shipment from Korea."

the “‘Relevant sale’ is ‘the first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market.’” Regardless of whether it does so or not, POSCO is certainly in a position to set the price of subject GOES.

POSCO relies upon *Paper from Indonesia*, which is also distinguishable from this investigation. First, *Paper from Indonesia* is distinguishable from the instant investigations for the same reason as discussed for *Cold-Rolled Steel from Korea* above. Second, in *Paper from Indonesia*, the Department preliminarily stated that the transaction between the respondent and the unaffiliated trading company was not the relevant sale because (1) the respondent did not negotiate the sales price with the unaffiliated trading company; (2) the role of the unaffiliated trading company in the sales process was unclear; and (3) the respondent knew that the next party in the sales process was a party affiliated with the respondent.⁵⁷ Although in this investigation POSCO knew that the subsequent sale was made to POSCO’s U.S. affiliate, record evidence demonstrates that the unaffiliated trading company submitted orders at the prevailing price offered by POSCO.⁵⁸ Even though record evidence does not demonstrate that POSCO necessarily negotiated a sales price with the unaffiliated customer in Korea, that company was the party to accept the offered term of sale proposed by POSCO.⁵⁹ Furthermore, the price and the other terms of sale (including quantity) between POSCO and the unaffiliated customer in Korea were set in POSCO’s typical sales process, *i.e.*, by the customer placing the orders through POSCO’s electronic ordering system.⁶⁰ As stated above, and despite POSCO’s claim, nothing on the record indicates that AAPC and the unaffiliated U.S. customer made agreements for sale prior to POSCO’s sale to its unaffiliated customer in Korea. This fact pattern does not resemble that in *Paper from Indonesia*, and, at any rate, the Department found the supposedly-analogous sales in question in *Paper from Indonesia* to be EP sales rather than CEP sales.⁶¹ Furthermore, as noted above, POSCO failed to provide sufficient documentation relating to the role of AAPC to justify using its sales as the basis for the Department’s analysis rather than the sales of POSCO to the its unaffiliated customer in Korea. There is no indication that the absence of information relating to the sales by a U.S. affiliate was a factor in either *Paper from Indonesia* or *Cold-Rolled Steel from Korea*.

Therefore, we are continuing to base our analysis upon the sales from POSCO to its unaffiliated customer in Korea, and to classify such sales as EP sales, as in the preliminary determination.

⁵⁷ See *Paper from Indonesia* 72 FR 30753, 30755 (June 4, 2007) (preliminary determination), and 72 FR 60636 (October 25, 2007) (final determination) and accompanying Issues and Decisions Memorandum at footnote 2.

⁵⁸ See POSCO’s Apr. 9, 2014 section A,B,C supplemental response (POSCO’s second supplemental response) at 5 and Exhibit 3 (the price schedule between POSCO and a certain unaffiliated home market customer during the POI) compared with POSCO’s first supplemental response at 3 and Exhibit S-1 (the price schedule between AAPC and the unaffiliated U.S. customer during the POI); *see also* summary of these data at Domestic Parties’ Rebuttal Brief at 6-7.

⁵⁹ *Id.*

⁶⁰ See Sales Verification Report at 25 (describing POSCO’s electronic ordering interface system) and 40.

⁶¹ See, *e.g.*, *Paper from Indonesia* and accompanying Issues and Decisions Memorandum at “Margin Calculation” section.

Comment 2: CEP Offset

Because POSCO argued that the Department should find that POSCO's U.S. sales were made on a CEP basis, it urged the Department to grant POSCO a CEP offset. POSCO made extensive comparisons between the number and intensity of the home market and U.S. market selling functions. POSCO contrasted the volume of sales and number of customers in each market.⁶² POSCO asserted that the Department has consistently found that POSCO was entitled to a CEP offset with identical or similar facts, citing *Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea*, 77 FR 14501 (Mar. 12, 2012); *Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea*, 76 FR 15291 (Mar. 21, 2011); *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 75 FR 13490 (Mar. 22, 2010); and *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 74 FR 11082 (Mar. 16, 2009).⁶³

Domestic parties offered a broad refutation of POSCO's contentions, primarily based upon the lack of record evidence for POSCO's claim of performing more selling functions with respect to its home market sales than for its U.S. sales. According to domestic parties, POSCO identified the same activity in different selling functions so as to overstate the number of selling functions for home market sales. Domestic parties claimed that some selling functions were made for POSCO's benefit rather than being incurred on behalf of POSCO's customers.⁶⁴ Domestic parties stated that the sales verification report highlights the minimal involvement by POSCO's sales personnel in the domestic sales process, stating that (with respect to home market sales) POSCO's "sales personnel operate less as salesman than as inventory managers due in large measure to the nature of GOES as a product." Again citing the sales verification report, domestic parties maintained that the paperwork generated for POSCO's EP sales was "in almost all respects the same as a domestic sale." Domestic parties argued that POSCO's attempt to minimize the role its personnel play in the U.S. sales process is contradicted by the record.

Department's Position:

Because the Department is continuing to use POSCO's sales to the unaffiliated customer in Korea as its relevant U.S. sales and continuing to classify those sales as EP sales, no CEP offset would be appropriate; this issue is consequently moot.

Comment 3: Exporter's Indirect Selling Expenses and Net Reseller Profit Margin

POSCO stated that if the Department calculates U.S. price on a CEP basis, it should not deduct from the U.S. price both the indirect selling expenses incurred in Korea by POSCO's unaffiliated customer in Korea (DINDIR2U) and the net profit margin of that customer (COMMU). To do so, according to POSCO, would result in double counting since the profit margin of its unaffiliated customer in Korea is included in its sales price to POSAM and therefore included in POSCO's reported gross unit price.⁶⁵

⁶² See POSCO's case brief at 13-14.

⁶³ *Id.* at 14-15.

⁶⁴ See Domestic Parties' Rebuttal Brief at 16-17.

⁶⁵ See POSCO's Case Brief at 15-16.

Domestic parties made no comment with respect to this issue.

Department's Position:

Because the Department is continuing to use POSCO's sales to the unaffiliated customer in Korea as its U.S. sales and continuing to classify those sales as EP sales, the deductions in question are unnecessary; this issue is consequently moot.

Comment 4: Freight Revenue

POSCO submitted that the Department erroneously disregarded freight revenue (although it properly deducted freight expenses) in the Preliminary Determination calculations. POSCO contended that the antidumping questionnaire required it to report all movement expenses incurred in selling the subject merchandise in accordance with the terms of delivery. POSCO argued that it generally delivered the subject merchandise to its customer, meaning that POSCO's price is generally a delivered price. POSCO claimed that its home market gross unit selling price consists of two elements: (a) the product value (the unit price for the subject merchandise itself) and (b) the freight value (the unit price charged to the customer to deliver the product to the location specified in the delivery terms). According to POSCO, separately listing freight revenue on the invoice is done solely for accounting purposes, but freight revenue is an integral part of the selling price. POSCO stated that, because the negotiated price with the customer was inclusive of freight, a gross unit price that does not take into account freight revenue is not reflective of the terms of sale. POSCO concludes that the Department should include freight revenue in the calculation of normal value (NV), by adding the negative of the comparison market freight revenue (FRTREVVH) field in the calculation of the comparison market gross unit price adjustment (CMGUPADJ) field. In the alternative, POSCO claimed that the Department should not deduct brokerage, inland freight, or warehousing expenses in calculating NV if the Department continues to disregard freight revenue. POSCO stated that the Department made the same error with regard to U.S. price, and that the FRTREVU field should be added in the calculation of the U.S. market gross unit price adjustment field.⁶⁶

Domestic parties made no comment with respect to this issue.

Department's Position:

We agree with POSCO that freight revenue should be accounted for in the margin calculation of NV and net U.S. price. Therefore, we will subtract FRTREVVH in the calculation of CMGUPADJ (which, in turn, is subtracted from comparison market gross unit price (GRSUPRH), resulting in an addition of freight revenue), and will add U.S. market freight revenue (FRTREVU) in the calculation of USGUPADJ (which, in turn, is added to U.S. market gross unit price (GRSUPRU)). We do this (1) in the calculation of comparison market movement expenses (CMMOVE) in the comparison market, and (2) in the calculation of domestic movement expenses in the U.S. market (USDOMMOVE) in the U.S. market, because this is more appropriate than the programming language suggested by POSCO (where it was

⁶⁶ *Id.* at 16-18.

subtracted from comparison market billing adjustments (BILLADJH) in the CMGUPADJ line). In addition, we will cap the upward adjustments for freight revenue by the value of the corresponding freight expense fields for which the freight revenues apply (fields (a) comparison market inland freight for shipment to warehouse expenses (INLFTWH), (b) comparison market warehousing expenses (WAREHSH), and (c) inland freight charges (INLFTCH) for FRTREVVH; fields (d) domestic inland freight expenses for U.S. sales as expressed in U.S. dollars (DINLFTPU_USD), (e) domestic brokerage expenses for U.S. sales as expressed in U.S. dollars (DBROKU_USD), and (f) international freight for U.S. sales (INTNFRU) for FRTREVU), in accordance with Department practice.⁶⁷

Comment 5: Billing Adjustments

POSCO claimed that the Department deducted, instead of added, the comparison market billing adjustment variable, BILLADJH when calculating NV. POSCO proposed programming language for the comparison market program to correct the alleged error.⁶⁸

Domestic parties made no comment with respect to this issue.

Department's Position:

We agree that we failed to account for billing adjustments in the calculation of NV. We are correcting the programming to add BILLADJH in the calculation of NV. Because CMGUPADJ is being subtracted from GRSUPRH, we are adding negative BILLADJH in the calculation of CMGUPADJ, as suggested by POSCO, so that the net effect on NV is an upward adjustment for the billing adjustment.

Comment 6: Classification of Late Payment Fees as Expenses

POSCO declared that the Department erroneously classified late payment fees as expenses rather than revenues. POSCO asserted that it had reported late payment fees received from customers in its home market sales database, which were reviewed during the sales verification. POSCO commented that the Department disregarded these fees in its margin calculations. POSCO proposed programming language for the comparison market program to correct the alleged error. POSCO's proposed programming change in the calculation of the home market direct selling expense field (CMDSELL) would deduct, for each home market sale observation, the lower of the reported late payments (LATEPAYH) or imputed credit (CMCRED).⁶⁹

Domestic parties made no comment with respect to this issue.

⁶⁷ See, e.g., *Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 76 FR 49729 (August 11, 2011), and accompanying Issue and Decision Memorandum at comment 4; see also *Purified Carboxymethylcellulose From Finland: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 50028 (August 16, 2013), and accompanying Decision Memorandum under "U.S. Price" section, unchanged at *Purified Carboxymethylcellulose From Finland: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 1826 (January 10, 2014).

⁶⁸ See POSCO's Case Brief at 18.

⁶⁹ *Id.*

Department's Position:

We agree the Department erred in the *Preliminary Determination* by adding LATEPAYH in the calculation of the CMDSELL field (which in turn is deducted from GRSUPRH). However, POSCO has neither explained the rationale behind, nor provided any precedent for, its proposal to cap late payments revenue by imputed credit expense. The Department's practice for reported amounts of interest revenue, such as POSCO's reported LATEPAYH, is not to cap such revenue by the amount of the associated imputed credit expenses.⁷⁰ POSCO has provided no reason why it is appropriate to do so in this investigation. Consequently, we are correcting our calculation by simply deducting LATEPAYH in the calculation of CMDSELL (thereby reducing that expense field by the amount of late payments received).

Comment 7: Model Match Variables

POSCO submitted that the Department erroneously included informational product characteristics in its model match program in its margin calculations. POSCO contended that the antidumping questionnaire issued to POSCO instructed it to report (i) specification, (ii) grade, (iii) maximum core loss, (iv) flux density basis, and (v) frequency basis without including these fields in the construction of the CONNUM. POSCO argued that the Department improperly included these variables in the model match portions of the comparison market and margin programs in the Preliminary Determination. POSCO proposed programming language for the comparison market and the margin programs to correct the alleged error.⁷¹

Domestic parties made no comment with respect to this issue.

Department's Position:

We agree with POSCO that the Department inadvertently included five fields in its model match programming. We are revising our programming to remove those five fields from those sections of the programming. We note that POSCO's proposed language to correct those errors still retained two of the five fields in question.

Comment 8: Differential Pricing Analysis

POSCO argued that, pursuant to Article 2.4.2 of the World Trade Organization (WTO) Antidumping Agreement (ADA), the United States is not permitted to either (1) apply the alternative average-to-transaction method to all U.S. sales or (2) deny offsets for non-dumped sales (*i.e.*, zero). POSCO claimed that in several cases the panels stated that these actions are inconsistent with the ADA.

POSCO argued that the Department's application of the alternative average-to-transaction method to all U.S. sales is "equally defective under U.S. law," citing to the Department's final

⁷⁰ See *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*; 2011-2012, 79 FR 37284 (July 1, 2014), and the accompanying Issues and Decision Memorandum at comment 5.

⁷¹ *Id.* at 19.

determination in *PRCBs from Taiwan*,⁷² in which POSCO claimed that the explanation which the Department provided was inadequate.

Domestic parties countered that the Department has already considered and rejected these same arguments in other proceedings.⁷³ Accordingly, the Department should continue to apply the average-to-transaction method to all U.S. sales and continue to deny offsets for non-dumped sales under this comparison method.

Department Position:

The Department disagrees with POSCO that the Department must amend its *Preliminary Determination* because of an inferred requirement imposed by the WTO ADA or an adverse WTO panel report. No WTO panel or appellate body determination has addressed the use of an alternative comparison methodology or the denial of offsets for non-dumped transactions pursuant to section 777A(d)(1)(B) or the second sentence of Article 2.4.2 of the ADA. Each of the WTO panel reports in which it found that the United States had not fulfilled its obligations under the ADA by denying offsets for non-dumped transactions involved the first sentence of Article 2.4.2. The United States has fully implemented these decisions pursuant to the requirements established by the URAA.⁷⁴

Furthermore, no panel reports or appellate body decisions have been issued concerning the application of the alternative average-to-transaction comparison method or the denial of offsets for non-dumped transactions where an investigating authority seeks to address the application of an alternative comparison method under the second sentence of Article 2.4.2 of the ADA. In addition, the Federal Circuit has affirmed that Department's practice of denying offsets for non-dumped sales when using the average-to-transaction method.⁷⁵

The Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.⁷⁶ Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.⁷⁷ As is clear from the discretionary nature of this scheme,

⁷² See *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010) and the accompanying Issues and Decision Memorandum (*PRCBs from Taiwan*).

⁷³ 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 the accompanying Issues and Decision Memorandum at 28-30; *Steel Threaded Rod From India: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part; 2012-2013*, 79 FR 40714 (July 14, 2014) and the accompanying Issues and Decision Memorandum at 19-21; 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) and the accompanying Issues and Decision Memorandum at 27-31.

⁷⁴ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006); and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012).

⁷⁵ See *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013).

⁷⁶ See *Corus Staal BV v. U.S. Dep't of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), *cert. denied* 126 S. Ct. 1023 (2006); accord *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).

⁷⁷ See, e.g., 19 U.S.C. § 3533, 3538.

Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute.⁷⁸ With regard to the denial of offsets for non-dumped sales when using the average-to-transaction method under the second sentence of Article 2.4.2, the Department has issued no new determination and the United States has adopted no change to its methodology pursuant to the URAA's statutory procedure.

The Department further disagrees with POSCO's argument that the application of the alternative average-to-transaction method is impermissible under U.S. law. Section 777A(d) of the Act states:

(d) Determination of Less Than Fair Value.

(1) Investigations.

(A) In general. In an investigation under subtitle B, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value

(i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or

(ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(B) Exception. 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).

Section 777A(d)(1)(B) of the Act places no restrictions or requirements on the application of the average-to-transaction method beyond the requirements specified under subsections (i) and (ii), both of which must be satisfied in order to consider whether to apply an alternative comparison method. The statute makes no provision for whether the average-to-transaction method may be applied to all or some portion of the U.S. sales as an alternative to one of the standard

⁷⁸ See, e.g., 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary).

comparison methods provided for under section 777A(d)(1)(A) of the Act.⁷⁹ POSCO has provided no support for its argument that the statute provides any such limitations on the application of the average-to-transaction method; accordingly, POSCO's arguments are meritless.

The Department also finds misleading POSCO's trivialization of the quotation from *PRCBs from Taiwan*. The Department's explanation in that final determination regarded the application of the average-to-transaction method to all U.S. sales as a change from the limited application of the average-to-transaction method under the now-withdrawn regulations (which had governed targeted dumping (specifically 19 CFR 351.414(f)(2) (2007)) and limited the application of the average-to-transaction method to those sales which the Department identified as targeted). In full:

The Department finds that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a similarly uniform application of average-to-transaction comparisons for all transactions when satisfaction of the statutory criteria suggests that application of the average-to-transaction method is the appropriate method. The only limitations the statute places on the application of the average-to-transaction method are the satisfaction of the two criteria set forth in the provision. When the criteria for application of the average-to-transaction method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the average-to-transaction comparison methodology to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average normal values to the export prices (or constructed export prices) of individual transactions. While the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the average-to-transaction method to all sales, it does find that this interpretation is a reasonable one and is more consistent with the Department's approach to selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally. Accordingly, the Department is departing from the practice adopted under the now-withdrawn regulation of applying average-to-transaction comparisons to only a subset of sales. Instead, if the criteria of section 777A(d)(1)(B) of the Act are satisfied, the Department will apply average-to-transaction comparisons for all sales in calculating the weighted-average dumping margin.⁸⁰

Therefore, contrary to POSCO's assertion, the Department provided an explanation for its change to apply the average-to-transaction method to all U.S. sales in *PRCBs from Taiwan*. Consequently, we continue to apply the average-to-transaction method to all U.S. sales in this investigation.

⁷⁹ 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 the accompanying Issues and Decision Memorandum at 28-30; *Steel Threaded Rod From India: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part; 2012-2013*, 79 FR 40714 (July 14, 2014), and the accompanying Issues and Decision Memorandum at 19-21; 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), and the accompanying Issues and Decision Memorandum at 27-31.

⁸⁰ See *PRCBs from Taiwan*, Issues and Decision Memorandum at 5.

Comment 9: Floor of Zero for Imputed Credit Expenses

Domestic parties stated that the Department's decision to apply "a floor of zero for credit" under certain circumstances in the Preliminary Determination was not consistent with the Department's practice and fails to account for certain opportunity costs. Domestic parties maintained that the Department's practice is not to set negative U.S. imputed credit expenses to zero, citing *Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia*, 70 FR 13456 (Mar. 21, 2005), and accompanying Issues and Decisions Memorandum at comment 9. Domestic parties expressed the view that setting negative credit expenses to zero would not accurately reflect normal business practice and could distort the dumping margin calculation.⁸¹

POSCO made no comment with respect to this issue.

Department's Position:

We agree with domestic parties that the Department's practice has been to not set negative U.S. imputed credit expenses to zero. Consequently, we are adjusting our programming to allow negative imputed credit amounts to be used in the calculations.

Comment 10: Interest Rate for Imputed Credit for Home Market Sales

Domestic parties asserted that the antidumping questionnaire instructs respondents to compute imputed credit expenses using "a published commercial short-term lending rate" if they did not have short-term borrowings during the POI. Domestic parties commented that POSCO used a rate published by the Bank of Korea which the Department could not verify was actually short-term in nature.

Domestic parties averred that the Department ought to apply adverse facts available (AFA) by not deducting the credit expenses on home market sales made by POSCO during the POI.⁸²

POSCO confirmed that it had no short-term borrowings during the POI. POSCO commented that it used the short-term borrowing rates announced by the Bank of Korea (BOK) to calculate its credit expense. POSCO submitted that it had explained to the Department's verification team that the BOK segregates its loans into various categories, among which is the "Loans for Operations" subcategory comprising short term loans to corporations. POSCO contended that "Loans for Operations" refers to short-term working capital loans. POSCO argued that it properly calculated an average short-term interest rate based on this subcategory of loans.⁸³

POSCO claimed that the Department imputes credit expenses as a means of comparing different conditions of sale in different markets because companies sometimes provide different payment terms to different customers in those different markets, citing to *Certain Cold-rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative*

⁸¹ See Domestic Parties' Case Brief at 2-4.

⁸² *Id.* at 4.

⁸³ See POSCO's Rebuttal Brief at 2-3.

Review, 64 FR 11825 (March 10, 1999) and accompanying Issues and Decision Memorandum at comment 6. According to POSCO, imputing credit calculates the opportunity cost to a company of not having the funds for the period over which the company must finance the receivable and is accurate if it includes all the sources of the company's short-term funds, citing *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) and accompanying Issues and Decision Memorandum at comment 3.⁸⁴

POSCO stated that the Department only disallows credit expenses when an adjustment is warranted based on AFA. POSCO offered as an example a respondent who failed to report transaction-specific payment dates for certain of its downstream sales despite being able to do so, citing *Certain Steel Concrete Reinforcing Bars from Turkey: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke in Part*, 68 FR 23972, 23977 (May 6, 2003) (Preliminary); unchanged in *Certain Steel Concrete Reinforcing Bars From Turkey: Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part*, 68 FR 53127 (Sept. 9, 2003). POSCO maintained that the record clearly demonstrates that POSCO has fully cooperated with the Department's investigation and that there is no basis for the application of AFA to POSCO's reported credit expense.⁸⁵

POSCO declared that it did extend various payment terms to its customers but had no short-term borrowings during the POI, which makes the issue one of how the expenses associated with those payment terms ought to be quantified. POSCO reiterated that the BOK rates it used to calculate credit expense were short-term in nature.⁸⁶

POSCO asserted that the Department has frequently relied on the borrowing experience of an affiliated party for purposes of identifying a short-term interest rate for credit expense, citing *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review*, 74 FR 40167 (August 11, 2009) and accompanying Issues and Decision Memorandum at comment 12, and *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Spain*, 67 FR 35482 (May 20, 2002) and accompanying Issues and Decision Memorandum at 1. POSCO commented that its affiliated resellers both had short-term borrowings during the POI which are on the record of this proceeding and therefore available for calculation of POSCO's credit expense if the Department were to decide not to rely on the BOK rate.⁸⁷

Department's Position:

The entirety of this issue turns on a single paragraph in the sales verification report:

⁸⁴ *Id.* at 3.

⁸⁵ *Id.* at 3-4.

⁸⁶ *Id.* at 4.

⁸⁷ *Id.* at 4-5.

B. KRW (KRW) Short-Term Borrowing Interest Rate

Pages 12 and 13 are Oracle screen captures for account detail for account {X}, POSCO's KRW short term borrowings. Page 11 is an Oracle screen capture which shows that account {X} covers short term borrowings in KRW. Page 14 is the Bank of Korea economic statistics for interest rates based on newly-extended loans and discounts; subcategory: loans to corporations; subcategory: loans for operations. Mr. Jeong explained that loans for operations means, effectively, working capital loans (*i.e.*, short-term). However, we could see nothing on the Bank of Korea website which indicated that these were exclusively short-term in nature.⁸⁸

Domestic parties have seized upon the last sentence of that paragraph to insist that the rates upon which POSCO has relied are so unreliable as to rise to the level of a failure to cooperate – for which the Department ought to apply AFA. We do not agree. The verification team examined the Bank of Korea's website, from which it could not verify that the interest rate used by POSCO was made up exclusively of short-term loans. However, neither did the Department find any basis to suggest that the rate was based upon anything other than short-term loans. Absent any such basis we conclude it would be inappropriate to reject that interest rate, apply AFA, and use some alternative methodology to compute imputed credit expenses.

Comment 11: General and Administrative and Financial Expense Ratios

Domestic parties claimed that POSCO failed to submit its fiscal year (FY) 2013 audited financial statement to the Department prior to POSCO's March 12, 2014 questionnaire response even though the POSCO's auditors signed the financial statement on February 15, 2014. Domestic parties asserted that because POSCO's FY 2013 financial statement is now on the record of this proceeding and reflects the most recently completed FY, the FY 2013 financial statement should be used to calculate POSCO's general and administrative (G&A) and financial ratios.

Domestic parties argued that the Department should rely on POSCO's FY 2013 audited unconsolidated financial statement to recalculate POSCO's G&A ratio. Because the Department does not have information on the record concerning the expenses that are allocable to FY 2013 indirect selling expenses, domestic parties suggested that the Department account for the inclusion of indirect selling expenses in the G&A ratio by including indirect selling expenses in POSCO's home market sales for the sales-below-cost test.⁸⁹

Domestic parties clarified that the Department should rely on POSCO's FY 2013 audited consolidated statement to recalculate POSCO's financial expense ratio. Because the value of POSCO's short-term interest income for 2013 is not on the record, domestic parties suggested that the Department calculate the short-term income offset by multiplying POSCO's ratio of assets current to total assets (current and non-current assets) by the total interest income reported in its 2013 audited consolidated financial statement.⁹⁰

⁸⁸ See Sales Verification report at 50; the insertion of "{X}" in the cited passage replaces the account number, which is business proprietary information irrelevant to the discussion here.

⁸⁹ See the Domestic Parties' Case Brief at attachment 1 for domestic parties' suggested calculation of POSCO's G&A expense ratio.

⁹⁰ *Id.* at attachment 2 for domestic parties' suggested calculation of POSCO's financial expense ratio.

POSCO disagreed that it failed to provide its FY 2013 financial statement. POSCO countered that the Department did not make any specific requests for POSCO's FY 2013 financial statement.⁹¹ Moreover, POSCO claimed that it explained at verification that the FY 2013 financial statement were not available until shortly before the Department's sales verification took place.⁹²

POSCO alleged that the Department's practice is to calculate both G&A and interest expense based on annual data which most closely correspond to the period of investigation.⁹³ According to POSCO, in cases where two equally partial fiscal periods overlap the POI, as in the instant case, the Department's practice is to rely on the G&A and interest expense based on the prior-year financial statement so long as the expenses reasonably reflect the current situation.⁹⁴

POSCO concluded that because the Department has no reason to deviate from its established practice in this case, the Department should continue to use POSCO's reported G&A and interest ratios based on its FY 2012 financial statement for the Final Determination.

Department's Position:

We agree with POSCO and have continued to rely on POSCO's FY 2012 audited unconsolidated and consolidated financial statement to calculate POSCO's G&A and financial expense ratios, respectively, for the final determination.⁹⁵

⁹¹ See POSCO's Case Brief at 6.

⁹² POSCO cites to the Sales Verification Report at 5.

⁹³ POSCO cites to *Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 17503 (March 28, 2014) (*CORE from Korea*) and accompanying Issues and Decision Memorandum at comment 2; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Administrative Review*, 75 FR 13490 (March 22, 2010) and accompanying Issues and Decision Memorandum at comment 16; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Administrative Review and Partial Rescission*, 74 FR 11082 (March 16, 2009) and accompany Issues and Decision Memorandum at comment 3; *Stainless Steel Sheet and Strip in Coils: Final Results of Antidumping Duty Administrative Review*, 70 FR 73444 (December 12, 2005) (*SSSS from Mexico*) and accompanying Issues and Decision Memorandum at comment 5; *Stainless Steel Bar from India: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 64 FR 13771, 13776 (March 22, 1999) (*SSB from India*); and, *Final Results of Antidumping Duty Administrative Review: Silicon Metal From Brazil*, 63 FR 6899, 6906 (February 11, 1998) (*Silicon Metal from Brazil*).

⁹⁴ POSCO refers to *SSSS from Mexico* and accompanying Issues and Decision Memorandum at comment 5; *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico*, 67FR 55800 (Aug. 30, 2002) and accompanying Issues and Decision Memorandum at Comment 7 (*Steel Wire Rod from Mexico*); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Korea*, 63 FR 40404, 40413 (July 29, 1998) (*SS Wire Rod from Korea*).

⁹⁵ See the memorandum from LaVonne Clark to Neal M. Halper, Director, Office of Accounting, entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – POSCO," dated May 2, 2014, where we relied on POSCO's FY 2012 financial statements for the Preliminary Determination; see also the memorandum from LaVonne Clark to Neal M. Halper, Director, Office of Accounting, entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – POSCO," dated September 24, 2014.

It is the Department's practice to calculate general expenses, including financial expenses, based on the full FY information that most closely corresponds to the period of investigation or review.⁹⁶ In situations where the POI is divided equally between two fiscal years, it has been the Department's practice to use the financial statement from the most recently-completed fiscal year at the time the questionnaire response was submitted.⁹⁷ This practice enables the Department to calculate the G&A and financial expense ratios on a consistent and predictable basis between countries and respondents.⁹⁸ Moreover, the financial statement that includes the first six months of the POI was placed on the record earlier in the investigation, which affords parties more time to review and comment on the data.⁹⁹

In this case, the POI is split equally between FY 2012 and FY 2013. POSCO submitted its FY 2012 audited unconsolidated and consolidated financial statement in its section A submission dated December 30, 2013. As noted in the Department's Sales Verification Report, POSCO's FY 2013 financial statement became available one week prior to the May 25, 2014, start of the Department's sales verification.¹⁰⁰ The Department stated in the Sales Verification Report that it accepted the financial statement and included it as a sales verification exhibit.¹⁰¹ Because (a) POSCO's FY 2012 audited financial statement represented the most recently-completed financial statement when POSCO submitted its original questionnaire response, (b) neither party has raised any specific issues with the FY 2012 financial statement data, and (c) we find nothing particularly distortive or aberrational which would cause us to disregard the FY 2012 financial statement, we have, consistent with our practice, continued to rely on the FY 2012 financial statement for the final determination. Finally, we note that because we are not relying on the FY 2013 statement, domestic parties' suggested calculations of indirect selling and short-term interest income for FY 2013 are moot.

⁹⁶ See e.g., *SSB from India*, *SS Wire Rod from Korea*, and *Silicon Metal from Brazil*.

⁹⁷ See e.g., *SSSS from Mexico* and accompanying Issues and Decision Memorandum at comment 5 and *Steel Wire Rod from Mexico* and accompanying Issues and Decision Memorandum at comment 7.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Sales Verification Report at 1 and 5.

¹⁰¹ *Id.* at 5.

CONCLUSION

We recommend following the above methodology for this final determination.

Agree ✓ Disagree _____

Paul Piquado
Paul Piquado
Assistant Secretary
for Enforcement and Compliance

24 SEPTEMBER 2014
Date