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Investigation
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DATE: October 6, 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 Non-
Oriented Electrical Steel from the Republic of Korea

I. SUMMARY

In this final determination, the Department of Commerce (the Department) finds that non-oriented electrical steel (NOES) from the Republic of Korea (Korea) is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is July 1, 2012, through June 30, 2013.

We analyzed the comments of the interested parties in this investigation. As a result of this analysis, and based on pre-verification minor corrections and our findings at verification, we made certain changes to the margin calculations for the respondent in this case, POSCO/Daewoo International Corporation (collectively, POSCO). We recommend that you approve the positions we developed in the "Discussion of the Issues" section of this memorandum.

Below is the complete list of the issues in this investigation on which we received comments from parties:

1. Home Market Level of Trade
2. Home Market Sales Outside of the Ordinary Course of Trade
3. Denial of Offsets for Non-Dumped Sales When Using the Average-to-Transaction Method as an Alternative Comparison Method



II. BACKGROUND

On May 22, 2014, the Department published the *Preliminary Determination* in the LTFV investigation of NOES from Korea.¹ The Department conducted a cost verification of POSCO from June 12 through June 20, 2014, and sales verifications from July 14, 2014, through July 18, 2014, on July 21, 2014, and from July 28, 2014, through July 30, 2014. On June 19, 2014, POSCO requested that the Department conduct a hearing in this investigation, but withdrew its request on August 19, 2014.

We invited parties to comment on the *Preliminary Determination*. We received timely case and rebuttal briefs from the petitioner, AK Steel Corporation, and POSCO in August 2014. Based on our analysis of the comments received, as well as our findings at verification and pre-verification corrections, we recalculated the estimated weighted-average dumping margins from the *Preliminary Determination*.

III. CRITICAL CIRCUMSTANCES

The Department preliminarily found,² and continues to find, that critical circumstances do not exist for imports of NOES from Korea. For the final determination, we continue to find that there is no history of injurious dumping of NOES from Korea pursuant to section 735(a)(3)(A) of the Act. Further, the final estimated weighted-average dumping margin of 6.88 percent that we calculated for POSCO, the only mandatory respondent in this investigation, and for all other producers or exporters does not exceed the threshold sufficient to impute knowledge of dumping (*i.e.*, 15 percent for constructed export price sales). Therefore, we determine that there is no sufficient basis to find that importers should have known that the exporters were selling the merchandise under consideration at LTFV. Because the statutory criteria of section 735(a)(3)(A) of the Act have not been satisfied, we did not examine whether imports from POSCO or from all other companies were massive over a relatively short period pursuant to section 735(a)(3)(B) of the Act. Accordingly, we continue to find that critical circumstances do not exist for imports of NOES from Korea.

IV. SCOPE OF THE INVESTIGATION

The merchandise subject to this investigation consists of non-oriented electrical steel (NOES), which includes cold-rolled, flat-rolled, alloy steel products, whether or not in coils, regardless of width, having an actual thickness of 0.20 mm or more, in which the core loss is substantially equal in any direction of magnetization in the plane of the material. The term “substantially equal” means that the cross grain direction of core loss is no more than 1.5 times the straight grain direction (*i.e.*, the rolling direction) of core loss. NOES has a magnetic permeability that does not exceed 1.65 Tesla when tested at a field of 800 A/m (equivalent to 10 Oersteds) along (*i.e.*, parallel to) the rolling direction of the sheet (*i.e.*, B₈₀₀ value). NOES contains by weight more than 1.00 percent of silicon but less than 3.5 percent of silicon, not more than 0.08 percent

¹ See *Non-Oriented Electrical Steel from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 79 FR 29426 (May 22, 2014) (*Preliminary Determination*).

² *Id.*, 79 FR at 29427.

of carbon, and not more than 1.5 percent of aluminum. NOES has a surface oxide coating, to which an insulation coating may be applied.

NOES is subject to this investigation whether it is fully processed (*i.e.*, fully annealed to develop final magnetic properties) or semi-processed (*i.e.*, finished to final thickness and physical form but not fully annealed to develop final magnetic properties). Fully processed NOES is typically made to the requirements of ASTM specification A 677, Japanese Industrial Standards (JIS) specification C 2552, and/or International Electrotechnical Commission (IEC) specification 60404-8-4. Semi-processed NOES is typically made to the requirements of ASTM specification A 683. However, the scope of this investigation is not limited to merchandise meeting the ASTM, JIS, and IEC specifications noted immediately above.

NOES is sometimes referred to as cold-rolled non-oriented (CRNO), non-grain oriented (NGO), non-oriented (NO), or cold-rolled non-grain oriented (CRNGO) electrical steel. These terms are interchangeable.

Excluded from the scope of this investigation are flat-rolled products not in coils that, prior to importation into the United States, have been cut to a shape and undergone all punching, coating, or other operations necessary for classification in Chapter 85 of the Harmonized Tariff Schedule of the United States (HTSUS) as a part (*i.e.*, lamination) for use in a device such as a motor, generator, or transformer.

The subject merchandise is provided for in subheadings 7225.19.0000, 7226.19.1000, and 7226.19.9000 of the HTSUS. Subject merchandise may also be entered under subheadings 7225.50.8085, 7225.99.0090, 7226.92.5000, 7226.92.7050, 7226.92.8050, 7226.99.0180 of the HTSUS. Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope is dispositive.

V. MARGIN CALCULATIONS

We calculated constructed export price and normal value using the same methodology stated in the *Preliminary Determination*, except as follows:

We implemented pre-verification corrections that POSCO identified and that we examined during verification of POSCO's sales responses. In addition, we revised one of POSCO's affiliate's reported coil slitting costs to include the slitting yield loss on POSCO's general and administrative expenses included in the cost of production for the pre-slit coil.

VI. DISCUSSION OF THE ISSUES

Comment 1: Home Market Level of Trade

The petitioner asserts that the Department erroneously determined that POSCO's three reported home-market channels of distribution constituted a single level of trade (LOT). Specifically, the petitioner contends that, in the *Preliminary Determination*, the Department erroneously rejected POSCO's repeated claims that its home-market sales included two LOTs: (1) direct sales made

by POSCO to unaffiliated end users and distributors (Channel 1) and internet auction sales made by POSCO to unaffiliated end users and distributors (Channel 3); and 2) POSCO's sales through its affiliates, POSCO Transformer & Motor Core Co., Ltd. (TMC) and KOH-A Jung Gong Co., Ltd (KOHA) to unaffiliated customers (Channel 2). The petitioner claims that, based on POSCO's assertions and considerable record evidence, all home-market sales lists that POSCO submitted during this investigation accurately reported two LOTs, one for sales made by POSCO to unaffiliated customers and the other for downstream sales made by POSCO's affiliated resellers to unaffiliated customers.

The petitioner argues that the Department's analysis underlying its LOT determination in the *Preliminary Determination* was based only on the selling functions chart that POSCO submitted as part of its Section A questionnaire response. The petitioner contends that its examination of the chart indicates that the Department compared the selling activities reported for Channel 2 (POSCO's sales through its affiliates) to those reported for Channel 1 (POSCO's direct sales) and Channel 3 (POSCO's "cyber" sales). The petitioner argues that this comparison was flawed, however, because for Channel 2, the selling function chart only provides the selling activities performed by the affiliated resellers, TMC and KOHA, and omits the reporting of the selling activities that POSCO performs on its sales to TMC and KOHA. The petitioner contends that, although these additional selling activities were not reported in POSCO's selling functions chart, they are demonstrated in POSCO's responses and are evident by certain sales-related expenses that POSCO reported in its sales files.

The petitioner contends that the Department's finding in the *Preliminary Determination* conforms to POSCO's initial statement in its Section A response that all home-market sales constitute a single LOT; the Department's finding ignores, however, POSCO's subsequent change in its position concerning the home-market LOTs, as evident from POSCO's Section B narrative response and information reported in POSCO's home-market sales files. Specifically, the petitioner asserts, in its Section B response POSCO stated that it has two LOTs in the home-market, POSCO's sales to unaffiliated and affiliated customers, and affiliated resellers' downstream sales to unaffiliated customers. Consequently, the petitioner states, POSCO designated, in POSCO's home-market sales file, Channel 1 (POSCO's direct sales), Channel 2 (POSCO's sales to TMC and KOHA), and Channel 3 (POSCO's internet sales) as one LOT, *i.e.*, LOTH code "2," and in the TMC/KOHA's downstream sales file, POSCO designated Channel 2 (TMC's and KOHA's downstream sales) as another LOT, *i.e.*, LOTH code "3." The petitioner emphasizes that in its submissions of multiple home-market sales files in this investigation, POSCO consistently treated its direct sales as LOTH 2 and the downstream sales as LOTH 3.

The petitioner contends that when examining the LOT for home-market sales by producers selling through affiliated resellers, it is the Department's practice to cumulate the selling

activities of the producer and the reseller.³ In doing so, the petitioner contends, it is impracticable to rely only on POSCO's selling functions chart provided in Section A response, because, as discussed above, it lacks a separate column that indicates the selling functions undertaken by POSCO for its sales to the affiliated resellers, and only reports the selling functions undertaken by the affiliated resellers for the downstream sales. Conversely, the petitioner asserts, when addressing its constructed export price (CEP) sales in the selling functions chart, POSCO provided columns separately showing its sales activities for sales to one of its U.S. affiliates, POSCO America Corporation (POSAM), and for sales to another U.S. affiliate, Daewoo International (America) Corporation (DWA) (through an affiliated Korean trading company, Daewoo International Corporation (DWI)). The petitioner asserts that by including the columns in its selling functions chart showing POSCO's selling activities for sales to POSAM and DWI (concerning CEP sales), POSCO is implicitly conceding that there are, in fact, reportable selling activities for its sales to affiliated resellers, TMC and KOHA (concerning home-market sales). Furthermore, the petitioner argues, it is reasonable to assume that most or all of the selling activities that POSCO identified with respect to its sales to POSAM and DWI are also undertaken by POSCO for its sales to TMC and KOHA in the home market; these selling activities include packing, inventory maintenance, order input and processing, direct sales personnel, provision of warranty services, provision of freight and delivery, and advertising.

The petitioner asserts that, if POSCO reported the selling activities for sales to its affiliates or had the Department considered the activities demonstrated in the record (discussed below) and cumulated them with the activities reported by the affiliated resellers, the Department would have been compelled to find that there are two home market LOTs. The petitioner contends that POSCO's failure to report such selling activities does not justify the Department's erroneous reliance only on the selling functions chart because the Department is required to consider the entire evidentiary record.⁴ The petitioner argues that the Department has an overriding duty to calculate margins as accurately as possible;⁵ the home market LOT determination cannot rest on information (*i.e.*, POSCO's selling functions chart) that is known to be incomplete, because doing so leads to inaccurate margins.

The petitioner provides a discussion of record evidence that it claims demonstrates that POSCO should have reported certain selling activities in its selling functions chart concerning downstream sales (*i.e.*, POSCO's selling activities related to its sales to affiliated resellers). Concerning packing, the petitioner asserts that POSCO reported that it performed the initial

³ The petitioner cites, among others, *Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil: Preliminary Results of Antidumping Duty Administrative Review and Extension of Time Limit for the Final Results*, 75 FR 19369, 19373 (April 14, 2010) (unchanged in *Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil: Final Results of Antidumping Duty Administrative Review*, 75 FR 64254 (October 19, 2010)) (*HR FR Carbon Steel from Brazil*), *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results and Rescission, in Part, of Antidumping Duty Administrative Review*, 75 FR 18788, 18792-93 (April 13, 2010) (unchanged in *Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review*, 75 FR 64696 (October 20, 2010)), and *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 18749, 18751-52 (April 7, 2008) (unchanged in *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 73 FR 61019 (October 15, 2008) and accompanying Issues and Decision Memorandum (IDM) at Comment 8).

⁴ The petitioner cites *Mid Continental Nail Corp. v. United States*, 770 F. Supp. 2d 1372 (CIT 2011).

⁵ The petitioner cites *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191 (CAFC 1990).

packing services on all products it sold during the POI, and the associated expenses were reported in POSCO's sales list, including for sales to the affiliates. Further, the petitioner contends that POSCO identified re-packing services as a selling function that was performed by the affiliated resellers on POSCO's goods that were slit in a further manufactured operation; POSCO did not report re-packing services concerning its direct sales. To the extent that the repacking function serves as an additional distinction between home-market Channel 1 and 2, the petitioner contends that the Department should include this difference in its cumulated analysis.

Concerning inventory maintenance, the petitioner asserts that POSCO reported inventory carrying costs in POSCO's sales list, including for sales to the affiliates. Concerning order input/processing, the petitioner asserts that, with the exception of home-market Channel 3 (*i.e.*, cyber sales), POSCO reported that the sales process is the same between the different channels of distribution; an examination of POSCO's and affiliates' sales process flowcharts reveals evidence that POSCO performed the type of order input/processing that is similar to that performed by the affiliated resellers.

Concerning direct sales personnel, the petitioner contends that POSCO employed direct sales personnel associated with its sales to the affiliates; specifically, POSCO reported that its invoicing practice is the same for all home market sales, regardless of customer or channel of distribution, and the record supports that POSCO's direct sales personnel perform sales functions that are similar to those performed by the affiliates, including the preparation of sales-related documentation on all sales including sales to TMC and KOHA. The petitioner also claims that the involvement of direct sales personnel is also demonstrated by individuals that are responsible for the numerous selling functions described in POSCO's and affiliates' sale process flow charts, as well as by the sales invoices which are separately prepared by individuals from POSCO and the resellers.

Concerning provision of warranty services, the petitioner contends that POSCO reported that the warranty services provided by the affiliated resellers are similar to those provided by POSCO; POSCO's provision of such services is demonstrated by the warranty costs that POSCO reported in its sales file concerning certain sales it made to the affiliates during the POI.

Concerning the arrangement for freight and delivery, the petitioner asserts that POSCO reported freight expenses in POSCO's sales list, including for sales to the affiliates.

Concerning advertising, the petitioner argues that POSCO performs extensive goodwill advertising activities for all home-market customers, while affiliates' separate performance of advertising selling functions is illustrated by their websites.

POSCO argues that the Department's finding in the *Preliminary Determination* of a single LOT in the home market is consistent with record evidence and the Department's practice. POSCO contends that the reporting of two LOTs does not amount to any assertion on its part, and the petitioner conflates POSCO's coding of its LOT designations in its sales files with POSCO's position regarding the LOT. POSCO asserts that it identified two LOTs in its upstream and downstream sales files merely as means to distinguish the two databases (*i.e.*, designating all sales reported in the upstream sales file with a LOTH variable code "2" and all sales reported in

the downstream sales file with a LOTH variable code “3”). POSCO asserts that this distinction does not amount to an assertion that POSCO had two separate LOTs in the home market. Accordingly, POSCO contends, there is no reason for the Department to deviate from its finding of a single LOT in the *Preliminary Determination*.

POSCO asserts that the Department’s decision in the *Preliminary Determination* is consistent with its regulations and its practice of determining the LOT based on its assessment of the selling functions performed for each channel of distribution. POSCO argues that the Department’s regulations at 19 CFR 351.412(c)(2) require “substantial differences” in the selling activities between channels as a necessary (but not sufficient) condition for finding that sales are made at different marketing stages, and thus, at different LOTs. For this reason, POSCO argues, a respondent’s reporting of multiple LOTs does not automatically equate to the Department’s finding of such; rather, the Department examines the chain of distribution and selling activities of the respondent before reaching a decision regarding the LOT. Indeed, POSCO asserts, it is common for the Department to find a single LOT even when a respondent reported multiple LOTs.⁶

Further, POSCO argues, the Department’s finding of a single LOT for separate channels of distribution involving direct sales and sales through affiliated resellers is consistent with its practice.⁷ In fact, POSCO argues, the Department found a single LOT even when the respondent reported that it performs greater selling functions for one channel over another.⁸ Further, POSCO contends, even when the producer conducts certain sales activities in the course of selling through a reseller, the Department found it unnecessary to find a separate LOT for sales through the affiliated reseller when the producer and the reseller coordinate in conducting selling

⁶ POSCO cites, among others, *Stainless Steel Bar From India: Preliminary Results of, and Partial Rescission of, the Antidumping Duty Administrative Review, and Intent Not To Revoke the Order, in Part*, 76 FR 12044, 12050 (March 4, 2011) (unchanged in *Stainless Steel Bar from India: Final Results of the Antidumping Duty Administrative Review, and Revocation of the Order, in Part*, 76 FR 56401 (September 13, 2011)); *Light-Walled Rectangular Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 55559, 55562 (September 13, 2010) (unchanged in *Light-Walled Rectangular Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review*, 76 FR 9547 (February 18, 2011)) (*Rectangular Pipe from Mexico*); *Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Final Results of Antidumping Duty Administrative Review*, 73 FR 31961 (June 5, 2008) (*Hot-Rolled Carbon Steel Flat Products From India*) and accompanying IDM at Comment 19; and *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 18165, 18170 (April 15, 2002) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792 (August 30, 2002)).

⁷ POSCO cites *Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review*, 69 FR 6259 (February 10, 2004) (*SS Sheet and Strip from Mexico*) and accompanying IDM at Comment 2; *Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010) and accompanying IDM at Comment 7; *Rectangular Pipe from Mexico: Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 53363, 53369 (September 11, 2006) (unchanged in *Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Final Results of Antidumping Duty Administrative Review*, 72 FR 12758 (March 19, 2007)); and *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Review in Part*, 72 FR 58053 (October 12, 2007) (*Ball Bearings*) and accompanying IDM at Comment 11.

⁸ POSCO cites *Rectangular Pipe from Mexico* and *SS Sheet and Strip from Mexico*.

functions directed to the end customer.⁹ POSCO argues that this precedent demonstrates that the minor differences in sales activities or selling functions are insufficient for the Department to find different LOTs for POSCO's home-market sales. POSCO asserts that the petitioner failed to demonstrate that any differences in the sales functions for POSCO's direct sales and sales through resellers, should they exist, are substantial enough to warrant a finding of different LOTs in the home market.

Lastly, POSCO argues that the record evidence is consistent with the Department's finding of a single LOT. POSCO asserts that, contrary to the petitioner's allegation, POSCO did not fail to include a column in its selling functions chart, showing POSCO's selling activities in support of its sales to the affiliated resellers. POSCO argues that at no time was this purported omission identified as a deficiency by either the Department or the petitioner. For example, POSCO asserts, the petitioner submitted extensive comments regarding POSCO's selling functions chart on multiple occasions and had ample opportunity to assert the necessity for the omitted information; the petitioner did not raise this issue or request additional information about this issue throughout the entire course of this investigation.¹⁰ Furthermore, POSCO asserts that the Department specifically verified, in detail, the reported selling activities and intensities thereof that POSCO reported in its selling functions chart and found nothing to indicate two distinct LOTs in the home market.

The Department's Position: Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate normal value based on sales of foreign like products at the same LOT as the export price or CEP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent).¹¹ To make this determination, we typically review factors such as selling functions or services, classes of customer, and the level of selling expenses for each type of sale.¹² Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing.¹³ Similarly, while customer categories such as "distributor" and "wholesaler" may be useful in identifying different LOTs, they are insufficient in and of themselves to establish that there is a difference in the LOT.¹⁴

To determine whether POSCO's home-market sales were made at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the chain of distribution), including selling functions, class of customer (customer category), and the level of selling expenses for each type of sale.¹⁵ To determine whether POSCO's home

⁹ POSCO cites *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Prestressed Concrete Steel Wire Strand from Thailand*, 68 FR 68348 (December 8, 2003) and accompanying IDM at Comment 3.

¹⁰ POSCO adds that even after the *Preliminary Determination*, the petitioner failed to suggest any need for further information regarding POSCO's selling activities for sales to TMC/KOHA even though the entirety of its pre-verification comments was devoted to suggesting that the Department examine various selling activities reported by POSCO.

¹¹ See 19 CFR 351.412(c)(2).

¹² See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa*, 62 FR 61731, 61732 (November 19, 1997).

¹³ See 19 CFR 351.412(c)(2) ; see also *id.*

¹⁴ See *SS Sheet and Strip from Mexico*, and accompanying IDM at Comment 2.

¹⁵ See *Preliminary Determination*, and accompanying Preliminary Decision Memorandum at 19.

market sales were made at a different LOT than CEP sales, we examined stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer.¹⁶ In the *Preliminary Determination* we stated:

We examined the differences in selling functions reported in POSCO's responses to our requests for information. POSCO reported three channels of distribution in the home market: (1) direct sales to unaffiliated end users or distributors, (2) re-sales through affiliates to unaffiliated end users or distributors, and (3) internet auction sales to unaffiliated end users or distributors. We found that the selling activities associated with selling to each of the three channels of distribution do not differ. Specifically, we found that only the intensity of a single selling activity, inventory maintenance, varied among three distribution channels, and with the exception of inventory maintenance, we found no differences in the intensity of any of the selling functions. Based on a lack of meaningful differences in selling functions, we found that the three channels of distribution constituted a single level of trade in the home market.¹⁷

Our finding in the *Preliminary Determination* was based on POSCO's description of its home-market channels of distribution, along with its identification of the selling functions applicable to each channel of distribution, and its designation of respective selling functions' levels of intensity, as provided in POSCO's Section A response to our antidumping questionnaire.¹⁸ POSCO provided the updated version of its selling functions chart as part of its pre-verification corrections (adding re-packing activity attributable to home-market downstream sales of slit coil and POSAM's U.S. sales of slit coil).¹⁹

Along with the description of its home-market channels of distribution and the information it presented in its selling functions chart, POSCO also made a statement in its Section A response, "...the Department should find that POSCO's home market sales constitute a single LOT."²⁰ In its Section B response POSCO stated, however, "POSCO has two LOTs in the home market. The first LOT consists of POSCO's sales to unaffiliated and affiliated home market customers. The second LOT consists of TMC's and KOHA's downstream sales of the foreign like product, whether or not further processed, to unaffiliated home market customers. Accordingly, POSCO has reported code "2" in the B-1 Sales File and code "3" in the B-2 Sales File."²¹ The petitioner argues that POSCO's latter claim in its Section B response along with its identification of two LOTs in all its home-market sales databases supersede its former assertion in its Section A response. POSCO responds by arguing that its reporting of two LOTs in its sales lists does not amount to a position that POSCO had two separate LOTs in the home market. While POSCO's explanation in its case brief is plausible, the petitioner is correct that POSCO made opposite assertions regarding LOT in its Section A and Section B responses. It is this assertion in POSCO's Section B response, along with its reporting of two LOTs in its databases that gave

¹⁶ *Id.*

¹⁷ *Id.*, at 20 (record citation omitted).

¹⁸ See POSCO's January 22, 2014, Section A response (AQR) at A-22 through A-32 and Exhibit A-7 and A-8.

¹⁹ See POSCO's July 28, 2014, submission, "Non-Oriented Electrical Steel from Korea: Sales Verification Exhibits," at page 5 (hereinafter, POSCO's Selling Functions Chart).

²⁰ See POSCO's AQR at A-31.

²¹ See POSCO's February 12, 2014, Section B response at B-35 and B-36.

rise to the petitioner's contention that in the *Preliminary Determination* we erroneously rejected POSCO's repeated claims that its home-market sales included two LOTs. Regardless of these conflicting statements, the Department examined the record evidence and disagrees that POSCO has two LOTs in the home market. The LOT determination rests squarely with the Department, notwithstanding a respondent's particular reporting of its LOTs;²² and in certain cases the Department found a single LOT even when a respondent designated multiple LOTs.²³

We concede that our finding in the *Preliminary Determination* of a single LOT in the home market for POSCO, due to an absence of meaningful differences in selling functions among the reported channels of distribution, was based on an incomplete analysis. Specifically, we overlooked the fact that the selling functions that POSCO identified in its selling functions chart for the reseller channel of distribution (Channel 2) presented only the selling activities undertaken by the resellers,²⁴ and omitted the selling activities undertaken by POSCO for its upstream sales to the affiliated resellers. The petitioner is correct that, had such information been reported, our practice would prompt us to cumulate the selling activities of the producer and the reseller and, based on this aggregation of selling functions, determine whether the reseller channel of distribution constituted a unique and separate LOT in the home market.²⁵

The petitioner contends that the Department can cure the problem of omitted information by inferring that most or all of the selling activities that POSCO identified with respect to its sales to POSAM and DWI (concerning CEP sales) are also undertaken by POSCO for its sales to TMC and KOHA in the home market. The petitioner contends that once POSCO's selling activities are properly considered and cumulated with those of the resellers, the Department is compelled to find that there are two home market LOTs. The premise of the petitioner's contention is that the differences in the selling functions applicable to POSCO's direct sales and sales through resellers are substantial enough to warrant a finding that the former is at a more advanced stage of distribution. We agree with the petitioner that it is reasonable to attribute the selling activities (that POSCO undertakes with respect to its sales to POSAM and DWI for CEP sales) to TMC and KOHA for home-market sales, provided they can be demonstrated in the record. We disagree, however, with the petitioner's conclusion that the selling activities associated with the reseller channel of distribution are sufficiently different to warrant an LOT designation separate from POSCO's direct sales to unaffiliated customers.

POSCO reported the following selling activities it undertakes for sales to POSAM and/or DWI: packing, inventory maintenance, order input/processing, direct sales personnel, provision of warranty services, provision of freight and delivery, and advertising. As the following discussion makes clear, certain of these selling functions are demonstrated in the record and can appropriately be considered in the context of our revisited LOT analysis, while others are either not demonstrated and/or cannot be considered.

²² See Uruguay Round Agreements Act Statement of Administrative Action, H.R. Rep. No. 103-316, Vol. I at 829 (1994), reprinted in 1994 U.S.C.A.N. 3773, 4163 (SAA).

²³ See, e.g., *Hot-Rolled Carbon Steel Flat Products From India* and accompanying IDM at Comment 19.

²⁴ This is evident from the identifier, "(TMC, KOHA)," provided in each row with a positive entry in the selling functions chart contained in POSCO's AQR at Exhibit A-8.

²⁵ See, e.g., *HR FR Carbon Steel from Brazil*, 75 FR at 19379 ("For USIMINAS/COSIPA's sales made through the downstream sales channel, we consider the relevant functions to be the selling functions of both the producer and the reseller, i.e., the cumulative selling functions along the chain of distribution.").

Concerning packing, the Department does not consider packing to be a selling function relevant to an LOT analysis, because packing is reported by respondents either in the PACKH/U (packing) variable of the sales list or as part of variable overhead²⁶ - we make an adjustment for packing expenses in our margin calculations in accordance with section 773(a)(6)(A) of the Act.

Concerning inventory maintenance, POSCO reported “medium” level of intensity²⁷ for POSCO’s sales to POSAM/DWI and a “high” level of intensity for TMC’s/KOHA’s re-sales in Channel 2.²⁸ We agree with the petitioner that POSCO’s response supports the “medium” level of intensity for this selling function that can be attributed to POSCO’s sales to TMC and KOHA because POSCO reported similar inventory carrying costs for its direct sales and for its sales to these affiliates.²⁹ Cumulating two layers of inventory maintenance selling activity, performed by both POSCO and the re-sellers, amounts to an overall frequency of utilization of this function for the reseller channel of distribution that is higher than the “medium” level of intensity that POSCO reported for Channel 1 and Channel 3 (*i.e.*, direct sales).³⁰ However, the *Preliminary Determination* already made the finding that only the intensity of this sole selling activity varied among three distribution channels.³¹

Concerning order input/processing, POSCO reported “high” level of intensity for POSCO’s sales to POSAM/DWI and a “high” level of intensity for TMC’s/KOHA’s re-sales in Channel 2.³² We agree with the petitioner that POSCO’s response supports the “high” level of intensity for this selling function that can be attributed to POSCO’s sales to TMC and KOHA because 1) POSCO acknowledged that the sales process is the same for direct sales and sales to affiliates,³³ and 2) POSCO’s volume of sales to affiliates was substantial.³⁴ Cumulating two layers of order input/processing selling function, performed by both POSCO and the re-sellers, amounts to an overall frequency of utilization of this function for the reseller channel of distribution that is higher than the “high” level of intensity that POSCO reported for Channel 1 and Channel 3 (*i.e.*, direct sales).³⁵

²⁶ See *Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Brazil; Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 24524, 24527 (May 10, 2005) (unchanged in *Notice of Final Results of Antidumping Duty Administrative Review: Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Brazil*, 70 FR 60282 (October 17, 2005)); see also *Chlorinated Isocyanurates From Spain: Final Results of Antidumping Duty Administrative Review*, 72 FR 64194 (November 15, 2007), and accompanying IDM at Comment 1B (“Packing is distinguishable from selling activities such as freight services, rebates, and discounts, because these activities require processing time by sales personnel which is not accounted for in the calculated amount reported in the field itself.”).

²⁷ See *Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852 (December 13, 2000) and the accompanying IDM at Comment 5A (the level of intensity for each selling function is determined by evaluating the frequency of utilization of the selling activity).

²⁸ See POSCO’s Selling Functions Chart.

²⁹ See POSCO’s home-market sales list, “Posco_noes_hm106” (submitted with POSCO’s August 11, 2014, letter, “Non-Oriented Electrical Steel from the Republic of Korea: Revised Sales Databases and Updated Financial Statements.”)

³⁰ See POSCO’s Selling Functions Chart.

³¹ See *Preliminary Determination*, and accompanying Preliminary Decision Memorandum at 20.

³² See POSCO’s Selling Functions Chart.

³³ See POSCO’s AQR at A-35.

³⁴ *Id.*, at A-3.

³⁵ See POSCO’s Selling Functions Chart.

Concerning direct sales personnel, POSCO reported “high” level of intensity for POSCO’s sales to POSAM (and “medium” level of intensity for POSCO’s sales to DWI) and a “high” level of intensity for TMC’s/KOHA’s re-sales in Channel 2.³⁶ The petitioner focuses on POSCO’s invoicing practice and its preparation of sales-related documentation, (which POSCO asserted is the same regardless of customer or channel of distribution) and the similarity in how both POSCO and its affiliates perform these processes. We do not dispute that there are certain personnel that POSCO employs in selling NOES to its affiliates. We do not, however, see any record evidence (including that to which the petitioner refers) that demonstrates the extent of the involvement of POSCO’s direct sales personnel in selling to the affiliates in relation to the extent of the involvement in selling to unaffiliated customers. In other words, the record evidence to which the petitioner refer, is geared more towards assessing an order input/processing selling function instead of a direct sales personnel selling function. As such, this selling function is not effectively demonstrated in the record and, thus, we do not find it appropriate to qualify the intensity of the direct sales personnel selling function attributable to POSCO’s sales to its affiliates as “high.” Nevertheless, because POSCO’s volume of sales to affiliates was substantial, as we mentioned above, it may be appropriate to qualify the intensity of this selling function as either “low” or “medium.” Cumulating two layers of direct sales personnel selling activity, performed by both POSCO and the re-sellers, may or may not, however, amount to an overall frequency of utilization of this function for the reseller channel of distribution that is higher than the “high” level of intensity that POSCO reported for Channel 1 and Channel 3 (*i.e.*, direct sales).³⁷

Concerning the provision of warranty services, POSCO reported that it “...conducts an investigation to determine whether the {warranty} claim is valid. In order to conduct the investigation, POSCO either requests that the customer deliver a sample of the defective product, or it sends personnel to the customer’s site and issues an investigation report. If POSCO finds that the warranty claim is valid...POSCO negotiates with the customer for appropriate compensation...”³⁸ Further, POSCO reported that “the warranty services provided by TMC and KOHA are similar to those provided by POSCO...During the POI, TMC and KOHA did not receive any warranty claims, and thus, did not incur this expense.”³⁹ For the provision of warranty services selling activity, POSCO reported “medium” level of intensity for POSCO’s sales to POSAM/DWI, a “medium” level of intensity for TMC’s/KOHA’s re-sales in Channel 2, and a “medium” level of intensity for POSCO’s sales in Channel 1 and Channel 3.⁴⁰ The record is clear that POSCO reported warranty expenses for sales to its affiliates.⁴¹ We do not agree, however, with the petitioner that POSCO’s response supports the “medium” level of intensity for the provision of warranty claims selling function that can be attributed to POSCO’s sales to TMC and KOHA because POSCO reported significantly higher warranty costs for its direct sales versus for its sales to these affiliates (in limited instances where POSCO incurred warranty costs).⁴² We find it reasonable to assume that the warranty claims involving significantly larger

³⁶ *Id.*

³⁷ *Id.*

³⁸ See POSCO’s February, 2014, Section B response (BQR) at B-46 and B-47.

³⁹ *Id.*, at B-47.

⁴⁰ See POSCO’s Selling Functions Chart.

⁴¹ See POSCO’s home-market sales list, “Posco_noes_hm106.”

⁴² *Id.*

compensations are commensurate with the level of sale personnel involvement in investigating and handling such claims. Thus, it is more appropriate to qualify the intensity of POSCO's provision of warranty services to its affiliates as "low." Further, the record is clear that TMC/KOHA did not report any warranty expenses during the POI.⁴³ Accordingly, it was incorrect for POSCO to report a "medium" level of intensity for TMC's/KOHA's re-sales in Channel 2. Thus, the cumulating of the provision of warranty services selling function amounts to an overall frequency of utilization of this function for the reseller channel of distribution that is lower than the "medium" level of intensity that POSCO reported for Channel 1 and Channel 3 (*i.e.*, direct sales).⁴⁴ Lastly, it is important to observe that this selling function is not significant in the LOT analysis because POSCO reported warranty costs for a miniscule portion of its sales in the home market.⁴⁵

Concerning the provision of freight and delivery, POSCO reported "high" level of intensity for POSCO's sales to POSAM/DWI and a "high" level of intensity for TMC's/KOHA's re-sales in Channel 2.⁴⁶ We agree with the petitioner that POSCO's response supports the "high" level of intensity for this selling function that can be attributed to POSCO's sales to TMC and KOHA because POSCO reported freight costs for its direct sales and for its sales to the affiliates.⁴⁷ Cumulating two layers of the provision of freight and delivery selling activity, performed by both POSCO and the re-sellers, amounts to an overall frequency of utilization of this function for the reseller channel of distribution that is higher than the "high" level of intensity that POSCO reported for Channel 1 and Channel 3 (*i.e.*, direct sales).⁴⁸

Concerning advertising, POSCO reported "N" (*i.e.*, "none") level of intensity for POSCO's sales to POSAM (and "low" level of intensity for POSCO's sales to DWI) and a "medium" level of intensity for TMC's/KOHA's re-sales in Channel 2.⁴⁹ The petitioner argues that POSCO performs extensive goodwill advertising activities for all home-market customers. The petitioner points to our statement in the verification report, where we stated that we examined a screen print of POSCO's website which contained video clips of the various TV advertisement broadcasts which took place in the Korean market promoting POSCO's brand image.⁵⁰ This statement is not, however, dispositive that POSCO's overall promotion of its brand image in Korea also targeted its home-market affiliated customers. Nor is it logical to infer that POSCO has any business need to promote its brand image to affiliated customers, the purchasing decisions of which it already controls. As such, this selling function is not effectively demonstrated in the record. Nevertheless, were we to cumulate the advertising selling function, it would amount to an overall frequency of utilization of this function for the reseller channel of

⁴³ See TMC/KOHA home-market sales list, "Posco_noes_hm205" (submitted with POSCO's August 11, 2014, letter, "Non-Oriented Electrical Steel from the Republic of Korea: Revised Sales Databases and Updated Financial Statements."

⁴⁴ See POSCO's Selling Functions Chart.

⁴⁵ See POSCO's home-market sales list, "Posco_noes_hm106."

⁴⁶ See POSCO's Selling Functions Chart.

⁴⁷ See POSCO's home-market sales list, "Posco_noes_hm106."

⁴⁸ See POSCO's Selling Functions Chart.

⁴⁹ *Id.*

⁵⁰ See memorandum to the file entitled "Verification of the Sales Response of POSCO in the Less-Than-Fair-Value Investigation of Non-Oriented Electrical Steel from the Republic of Korea" dated August 6, 2014 (Verification Report) at 6.

distribution that is not higher than the “medium” level of intensity that POSCO reported for Channel 1 and Channel 3 (*i.e.*, direct sales).⁵¹

In sum, our exhaustive evaluation of record evidence concerning all selling activities (that POSCO undertakes with respect to its sales to POSAM/DWI for CEP sales) that could reasonably be imputed to the reseller channel of distribution, only two, order input/processing and the provision of freight and delivery, are demonstrated in the record to exhibit greater levels of intensities for the reseller channel of distribution than for direct sales. Taken together with the inventory maintenance selling function (identified in the *Preliminary Determination* as sole selling activity for which the intensity varied among three distribution channels), the total number is, thus, three. Further, these three functions are more passive, in so far as they are in response to sales that have already been made or in anticipation of sales to be made in the near future. We attribute less weight to these functions because the involvement of the sales personnel in the provision of these functions is more rudimentary, as opposed to functions such as strategic and economic planning, personnel training, engineering services, sales promotion, market research, technical assistance, *etc.*⁵² Further, we find that this number of dispositive selling functions must necessarily be placed in the context of all selling functions that POSCO reported and that we considered in our LOT analysis in the *Preliminary Determination*, some of which we also discussed above. POSCO reported a total of sixteen selling functions (not counting packing)⁵³ for the reseller channel of distribution, fourteen of which we considered.⁵⁴ The remaining eight reported selling functions (besides the three that we found to exhibit greater levels of intensity for the reseller channel of distribution, *i.e.*, inventory maintenance, order input/processing, and provision of freight and delivery, and the three that we found do not, *i.e.*, direct sales personnel, provision of warranty services, and advertising) are sales forecasting, strategic and economic planning, personnel training/exchange, engineering services, sales promotion, sales/marketing support, market research, and technical assistance. For these selling functions, which we find substantially more controlling⁵⁵ (than the six functions discussed above) in our overall examination of differences in the stages of marketing,⁵⁶ there is nothing in the record that suggests POSCO performed these activities for its sales to its affiliates, TMC and KOHA. In fact, we verified a number of these selling functions and intensities thereof, though from the perspective of substantiating POSCO’s entitlement to a CEP offset - we verified that POSCO performs these activities for its home-market sales while it does not for its sales to POSAM and DWI. As POSCO correctly asserts, however, during this verification procedure we observed nothing to indicate that POSCO performed the examined selling activities for its sales

⁵¹ See POSCO’s Selling Functions Chart.

⁵² See *Ball Bearings*, and accompanying IDM at Comment 11.

⁵³ See POSCO’s Selling Functions Chart.

⁵⁴ Although POSCO reported re-packing function in its Selling Functions Chart, we did not consider this as a selling function in our LOT analysis because it represents the packing of slit products resulting from further manufacturing operations undertaken by the affiliates on coil purchased from POSCO; also, although POSCO reported provision of post-sale warehousing function in its Selling Functions Chart, we did not consider it in our LOT analysis because POSCO did not report post-sale warehousing costs for its sales to TMC/KOHA and, similarly, TMC/KOHA did not report such expenses for its sales to unaffiliated customers.

⁵⁵ The performance of these functions requires sales personnel to possess specific expertise, thus directly affecting the extent of sales personnel involvement in the provision of these functions.

⁵⁶ See *Antidumping Duties and Countervailing Duties*, 62 FR 27296, 27369 (May 19, 1997) (the Department “will not rely solely on selling activities to identify levels of trade, but instead will evaluate differences in selling activities in the context of a seller’s whole scheme of marketing.”).

to TMC and KOHA, or that there are two distinct LOTs in the home market.⁵⁷ On the basis of this discussion of record evidence that we examined and verified, in part, we find that the selling activities associated with the reseller channel of distribution are not sufficiently different to warrant an LOT designation separate from POSCO's direct sales to unaffiliated customers. Our determination conforms to our practice in similar circumstances.⁵⁸

Comment 2: Home Market Sales Outside of the Ordinary Course of Trade

In the *Preliminary Determination*, we found that POSCO's overrun sales were outside the ordinary course of trade after considering several factors, including the channel of distribution, volume, number of customers, average sale quantity, and price and profit data for overrun sales.⁵⁹

POSCO argues that the Department erred in the *Preliminary Determination* in finding that home-market sales of overruns constitute sales outside the ordinary course of trade. POSCO urges the Department to include such sales in the margin calculations for POSCO in the final determination of this investigation. POSCO asserts that the record shows that the circumstances taken as a whole confirm that POSCO's home market sales of overrun products were made in the ordinary course of trade.

POSCO repeats the explanation it provided in its responses that overrun sales consist of, and are marketed and sold as, prime grade material and that no differences exist between the types of performance guarantees that POSCO offers to its customers for overrun vs. non-overrun products (*i.e.*, POSCO guarantees the core loss and magnetic flux density as they are identified in its mill certificates); overrun products have the same physical characteristics as non-overrun merchandise.

POSCO first takes issue with our conclusion in the Overruns Memo that overrun transactions constitute a distinct channel of distribution on the basis, in part, of POSCO's explanation that: 1) it sells the remaining inventories and as well as non-prime merchandise through Internet "cyber transactions," by way of electronic auctions; and 2) the bidding procedure and sales negotiation process for cyber transactions differ from traditional sales in that the starting price for auctioned product is a price that is discounted from the base price. POSCO asserts that, because it described in its responses that it typically sells overrun (and non-prime) products in cyber transactions through the Internet, the Department determined that this is the only means by which POSCO sells overrun products. POSCO provides in its case brief an analysis of the home-market volumes sold in each channel of distribution which, POSCO asserts, demonstrates that it also sold overrun products directly to end users. Specifically, POSCO claims that the quantity of overrun products it sold directly to end users, *i.e.*, through Channels 1 and 2, was

⁵⁷ See Verification Report at 5-6.

⁵⁸ See, *e.g.*, *Rectangular Pipe from Mexico*, 75 FR at 55562, and *Ball Bearings* and accompanying IDM at Comment 11.

⁵⁹ See *Preliminary Determination*, and Preliminary Decision Memorandum at 18 and Memorandum to Thomas Gilgunn, Acting Office Director, AD/CVD Operations, Office I, from Dmitry Vladimirov, International Trade Compliance Analyst, AD/CVD Operations, Office I, "Non-Oriented Electrical Steel from the Republic of Korea, Less-Than-Fair-Value Investigation: POSCO/DWI - Home Market Sales of Overruns" dated May 15, 2014 (Overruns Memo) at 3-4.

nearly double the quantity of overrun products that it sold in cyber transactions. Moreover, POSCO argues, the discounting of prices does not give rise to a finding of overrun sales constituting a separate channel of distribution. In its case brief, POSCO provides an analysis of the minimum reported prices for overruns and non-overruns, by control number (CONNUM) which, POSCO asserts, demonstrates that the starting prices for overruns are the same, or less than five percent smaller, than the prices for non-overruns for nine out of 12 CONNUMs in which both overrun and non-overrun products were sold.

POSCO also takes issue with the Department's findings regarding the volume of overrun sales and the number of overrun customers. For example, concerning the low volume of overrun sales, POSCO asserts that the Department's analysis erroneously considered only the total quantity, given that by their very nature, overrun sales will comprise a relatively small quantity on an overall basis. Moreover, POSCO argues, the Department previously recognized that it does not rely on overall calculations, but rather compares volumes within individual product groups.⁶⁰ POSCO provides in its case brief an analysis of volumes of overrun and non-overrun sales, by CONNUM which, POSCO asserts, shows that the overrun quantities for certain CONNUMs are very significant. Further, POSCO argues that the Department has long held that a small portion, in and of itself, does not render a particular group of sales outside the ordinary course of trade;⁶¹ the fact that only a small portion of POSCO's home-market sales are of overrun merchandise is well within the normal parameters for POSCO's home market, and there is no evidence to suggest that POSCO's sales of such merchandise was an extraordinary event in any manner for the Korean market.⁶² Concerning the number of overrun customers, POSCO contends that as a proportion of total home-market customers, it is significant.⁶³ Moreover, POSCO asserts that the vast majority of the overrun sales volume is accounted for by customers that purchased both overrun and non-overrun merchandise,⁶⁴ an indication that these products are in the ordinary course of trade.

POSCO takes issue with the Department's finding that the average quantity of overrun sales was smaller than that for non-overrun sales. POSCO contends that, other than observing the quantity differences, the Department has not explained why these differences render the overrun sales outside the ordinary course of trade. POSCO provides in its case brief an analysis of the home-

⁶⁰ POSCO cites *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part*, 70 FR 7237 (February 11, 2005) (*Pipes from Romania*) and accompanying IDM at Comment 14.

⁶¹ POSCO cites *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part*, 73 FR 66218 (November 7, 2008) (*Bars from Turkey*) and accompanying IDM at Comment 1.

⁶² POSCO cites *Lightweight Thermal Paper From Germany: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 77831, 77834 (December 14, 2010) (unchanged in *Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Administrative Review*, 76 FR 22078 (April 20, 2011) and accompanying IDM at Comment 2) (*Thermal Paper from Germany*), *United States Steel Corp. v. United States*, 953 F. Supp. 2d 1332 (CIT 2013) (*US Steel*), and *Koyo Seiko v. United States*, 186 F. Supp. 2d 1332 (CIT 2002) (*Koyo Seiko*).

⁶³ Because POSCO's analysis involves the use of business proprietary information, for further details see memorandum to file, "Antidumping Duty Investigation of Non-Oriented Electrical Steel from the Republic of Korea: Proprietary Issue" dated concurrently with this memorandum (BPI Memo).

⁶⁴ *Id.*, at 3 (containing numeric analysis).

market sales data which, POSCO argues, show that a significant number of prime non-overflow transactions (*i.e.*, 25 percent) were in quantity ranges comparable to overflow products.

POSCO disputes as inappropriate the Department's comparison of average prices between overflow and non-overflow sales. POSCO alleges that the problem with considering overall averages is that they sometimes mask patterns and do not account for outliers that may distort the calculations. POSCO argues that, given that the quantity of overruns is limited by the nature of the product, a more appropriate analysis should focus on the comparison of minimum prices, the results of which were summarized above. Concerning the Department's comparisons of relative profitability of overflow and non-overflow sales, POSCO asserts, in part,⁶⁵ that section 773(b)(1) of the Act separately provides the means to eliminate overflow sales that were made below the cost of production. As such, POSCO argues, the Department has a well-established procedure for evaluating whether to exclude below-cost home-market sales as being outside the ordinary course of trade which, concerning overflow sales, the Department disregarded in the *Preliminary Determination*.

POSCO comments that the Department found overflow sales to be in the ordinary course of trade in numerous cases.⁶⁶ In this case, POSCO reiterates, its overflow sales consist of, and are marketed and sold as, prime grade material; the uses of its overflow products are not limited because, other than the fact that they were produced in excess of the original customer's order, overflow products are identical to non-overflow products; and the abundance of customers that purchased overflow products and the number of overflow sales transactions⁶⁷ in POSCO's home-market sales database confirm that POSCO's overflow sales are within the ordinary course of trade.

The petitioner argues that, pursuant to sections 773(a)(1)(B) and 771(15) of the Act, the Department has the authority to exclude from its margin calculations home-market sales of overflow merchandise that it considers were made outside the ordinary course of trade. In a typical analysis underlying such determination, the Department normally considers, but is not limited to, (1) whether the merchandise is "off-quality" or produced according to unusual specifications; (2) the comparative volume of sales and the number of buyers in the home market; (3) the average quantity of an overflow sale compared to the average quantity of an

⁶⁵ *Id.*, at 4 (contains POSCO's additional BPI argument).

⁶⁶ POSCO cites, among others, *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 IDM at Comment 15, *Hot-Rolled Carbon Steel Flat Products From India*, and accompanying IDM at Comment 2, and *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil*, 64 FR 38756, 38770-71 (July 19, 1999).

⁶⁷ See BPI Memo at 4 (containing numeric analysis).

ordinary sale; and (4) price and profit differentials in the home market.⁶⁸ The petitioner contends that no single factor in such an analysis is dispositive and the Department, in relying on its considerable discretion, chooses how best to analyze the many factors involved in determining whether overrun sales are made outside the ordinary course of trade.⁶⁹

Concerning whether the product at issue is off-quality or produced to unusual specifications, the petitioner argues that although POSCO does not classify overrun products as non-prime, "...this sole factor does not enable these sales to be considered in the ordinary course of trade."⁷⁰ In addressing POSCO's arguments, the petitioner also relies on: 1) the updated version of its overrun analysis (that it initially presented to the Department in its comments⁷¹ preceding the *Preliminary Determination*) using POSCO's latest sales data (the updated analysis is appended to the petitioner's case brief, hereinafter referred to as AK Updated Overruns Analysis); and 2) the Department's own analysis appended to the Overruns Memo.

The petitioner asserts that the Department properly found that POSCO's overrun sales were made in a distinct channel of distribution. The petitioner asserts that a review of POSCO's questionnaire responses clearly shows that: (1) POSCO unintentionally produces overrun products; (2) it typically sells overruns through Internet or "cyber" auctions (*i.e.*, designated in the home-market sales database as Channel 3); and (3) some of POSCO's customers will not purchase overrun products even though the products are sold with the same performance guarantees and quality standards as prime products. The petitioner asserts that the Department focused on the cyber channel of distribution because that is the only channel POSCO mentioned when addressing overrun sales in its section A response; consequently, the Department was simply relying on POSCO's own descriptions of its channels of distribution and overrun sales. The petitioner argues that POSCO's own responses show that POSCO's business model envisions selling overrun products in the Internet auctions (*i.e.*, reported as Channel 3).

POSCO alleged that its case brief, which shows the volumes of overrun and non-overrun sales by the reported channel of distribution, illustrates that sales of overruns were not only not confined to the Internet channel of distribution, but also that the quantity of sales of overruns through other channels was nearly double that sold in the cyber transactions. Petitioners dispute that this is what can be gleaned from POSCO's analysis. First, the petitioner alleges, it is misleading for POSCO to assert that it "made" overrun sales through all three home-market channels of

⁶⁸ The petitioner cites the Department's Overruns Memo at 2, *Notice of Affirmative Final Determination of Sales at Less Than Fair Value: Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products From Japan*, 79 FR 19868 (April 10, 2014) and accompanying IDM at Comment 1; *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 13275 (March 10, 2014); and *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 4385,4386 (January 22, 2013) (*CTL Plate Korea 2011-12 Prelim*) (unchanged in *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 29113 (May 17, 2013)) (*CTL Plate Korea 2011-12 Final*).

⁶⁹ The petitioner cites *Laclede Steel Co. v. United States*, 19 C.I.T. 1076, 1078-1081 (CIT 1995) (*Laclede Steel*).

⁷⁰ The petitioner quotes *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 FR 24329, 24341 (May 6, 1999).

⁷¹ See the petitioner's submission entitled "Non-Oriented Electrical Steel From Korea: Petitioner's Pre-Preliminary Results Comments Concerning POSCO" dated April 16, 2014 (Pre-Prelim Comments).

distribution.⁷² Second, the petitioner continues, a fair comparison of Channels 1 and 3 considers the portion of overrun products in each channel.⁷³ The petitioner contends that it is clear that POSCO's business practice is to use home-market Channel 3 sales to rid itself of unintended overrun products.

The petitioner asserts that, when describing its reliance on home-market Channel 3 sales for overrun and non-prime products, POSCO squarely acknowledged that the production of overrun merchandise is not planned; in fact, overrun products are produced unintentionally and, thus, are not desired, just like non-prime merchandise. The petitioner contends that this acknowledgement is consistent with the concept embedded in the SAA,⁷⁴ which considered extraordinary characteristics of sale as a factor in deeming transactions outside the ordinary course of trade. In addition, the petitioner argues, POSCO's description of all products sold through home-market Channel 3 equates overrun products with non-prime products, and the Department has a longstanding practice of not comparing sales of prime merchandise to non-prime merchandise.⁷⁵ The petitioner argues that, by equating overrun products with non-prime products, POSCO is effectively acknowledging that its overrun sales should not be compared to planned sales of prime products that were made in the ordinary course of trade. Moreover, the petitioner contends that POSCO implicitly acknowledges that some customers will not accept overrun products, which further demonstrates such transactions take on characteristics that are not ordinary as compared to transactions generally made in the same market, as contemplated by SAA. Furthermore, the petitioner argues that POSCO attempts to back away from the statements it made in its responses where it stated that the starting price for auctioned Internet sales is discounted from the base price, by providing in its case brief an analysis that purports to show that the minimum prices are essentially the same for a majority of CONNUMs.

The petitioner asserts that the Department properly found that POSCO's overrun sales were of comparatively low volume and were made to a relatively small number of customers. The petitioner claims that the volumes of sales and the number of customers that the Department presented in its Overruns Memo are essentially unchanged and are supported by the petitioner's updated analysis of POSCO's sales.⁷⁶ The petitioner takes issue with POSCO's assertion that "the Department has previously recognized that it does not rely on overall calculations, but rather compares volumes within individual product groups," arguing that POSCO relied on an incomplete citation to *Pipes from Romania*. There, the petitioner asserts, only after laying this foundation for the importance of comparing the sales at issue to the total universe of prime home-market sales did the Department consider the ancillary analysis of sales volume within a smaller product group. Moreover, the petitioner argues, the Department rejected attempts to

⁷² See BPI Memo at 5 (containing numeric analysis).

⁷³ *Id.*

⁷⁴ See SAA at 834 (1994).

⁷⁵ The petitioner cites *Certain Oil Country Tubular Goods From Ukraine: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 79 FR 41969 (July 18, 2014), and accompanying IDM at 2.

⁷⁶ See *AK Updated Overruns Analysis* at Tables 6-8.

modify the overall volume analysis by comparing the goods in question to a subset of the home-market sales of foreign like product.⁷⁷

The petitioner comments that, despite the Department's clear preference for comparisons to the entire universe of home-market sales, and not some subset, POSCO's case brief includes an analysis that attempts to show that the overrun quantities for certain CONNUMs constituted more than 20 percent of the total sales quantity of that CONNUM. The petitioner asserts that POSCO's analysis does not inform the ordinary course of trade issue because it is heavily skewed.⁷⁸ The petitioner further argues that POSCO's analysis is in direct conflict with the statutory mandate to "consider whether home-market sales of overrun NOES are made within the ordinary course of trade as compared to other home-market sales of NOES."⁷⁹ The petitioner asserts that, as the Department found, a comprehensive analysis that properly considers all home-market sales of prime merchandise reveals that POSCO's overrun sales constitute a relatively small portion of all reported sales.⁸⁰ Further, the petitioner asserts that POSCO's reliance on *Bars from Turkey* is misplaced because that case cited a court decision that involved the consideration of sample sales as outside the ordinary course of trade solely because of the small quantities involved. Moreover, the petitioner takes issue with POSCO's reliance on *Thermal Paper from Germany*, *US Steel*, and *Koyo Seiko*, for its proposition that sales volume alone cannot support a finding that sales are made outside the ordinary course of trade. The petitioner asserts that neither the Department nor the petitioner took the position that POSCO's overrun sales are outside the ordinary course of trade solely because of the relatively small quantities; the Overruns Memo provides a comprehensive discussion of four factors. Accordingly, the petitioner argues, because much more evidence was considered and relied upon in this case, POSCO's position finds no support in the precedent it cited. Moreover, the petitioner contends that in the *Preliminary Determination*, the Department found the relative sales volumes and number of purchases to be significant⁸¹ and POSCO has not shown those decisions to be unsupported by the record evidence or that they amounted to an abuse of agency discretion.

The petitioner also takes issue with POSCO's objections to the Department's analysis comparing average sale quantities on a CONNUM-specific basis between overruns and non-overruns and its statement that the "Department has not explained why these differences render the overrun sales outside the ordinary course of trade." The petitioner argues that in its Overruns Memo, the Department explained that the purpose of the ordinary-course-of-trade provision is to prevent dumping margins from being based on sales which are not representative of the home market, and ensures that the comparisons between normal values and U.S. sale prices are done on an "apples-to-apples" basis.⁸² The petitioner argues that the identified quantity differential is significant for POSCO's day-to-day operations and for determining whether overrun sales are made in the ordinary course of trade.⁸³

⁷⁷ The petitioner cites *Gray Portland Cement and Clinker from Mexico: Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 2909 (January 18, 2006) (*Cement from Mexico*) and accompanying IDM at Comment 7.

⁷⁸ See BPI Memo at 7 (contains numeric analysis).

⁷⁹ The petitioner cites Overruns Memo at 2 (emphasis added) (discussing section 773(a)(1)(B)).

⁸⁰ The petitioner cites Overruns Memo at 3 and *AK Updated Overruns Analysis* at Table 6.

⁸¹ See BPI Memo at 7-8 (contains numeric analysis).

⁸² See Overruns Memo at 2.

⁸³ See BPI Memo at 8 (contains BPI argument and numeric analysis).

Concerning POSCO's analysis in its case brief, which the petitioner observes was not done on a CONNUM-specific level, and its statement that "fully 25% of {the} home market sales of prime non-overrun products were in quantity ranges comparable to overrun products," the petitioner argues that the defining factor in this analysis ("quantity ranges") is not defined; POSCO's tailored analysis does not rebut the broad-based quantity comparisons utilized by the Department and accepted by the Courts.⁸⁴ Concerning POSCO's objections to the Department's use of average prices in the analysis, the petitioner contends that POSCO ignores controlling precedent in which the courts approved use of overall averages.⁸⁵ Concerning profitability levels, the petitioner asserts that the Department's and its own analysis⁸⁶ clearly show why POSCO does not intend to produce overrun products. Nevertheless, the petitioner continues, the Court found that the disparity in profit levels is an absolute dispositive factor in determining that certain sales were made outside the ordinary course of trade.⁸⁷ The petitioner asserts that the pricing and profit analyses illustrate the purpose of the ordinary course of trade provision, which is "to prevent dumping margins from being based on sales which are not representative" of the home market;⁸⁸ these analyses make clear that POSCO's overrun transactions have characteristics that are not ordinary as compared to transactions generally made in the same market.⁸⁹

The petitioner concludes that the Department's finding in the *Preliminary Determination* that POSCO's overrun sales were not made in the outside the ordinary course of trade is based on application of a longstanding and judicially-approved method of analysis of record evidence, and is supported by substantial record evidence.

Department's Position: We continue to find that POSCO's home-market sales of overrun products are outside the ordinary course of trade. Section 773(a)(1)(B) of the Act provides that normal value shall be based on the price at which the foreign like product is first sold, *inter alia*, in the ordinary course of trade. Section 771(15) of the Act defines "ordinary course of trade" as the "conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." Furthermore, section 771(15) of the Act indicates that we shall consider, "among others," sales and transactions made below the cost of production pursuant to section 773(b)(1), and certain sales between affiliated parties within the meaning of section 773(f)(2) of the Act, to be outside the ordinary course of trade. Other than these two statutory exclusions, the Act provides "'little assistance in determining what is outside the scope of that definition.'" ⁹⁰ What may constitute "among others" in the statute is informed by statements in the SAA:

Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that

⁸⁴ The petitioner cites *China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1365 (CIT 2003) (*China Steel*).

⁸⁵ The petitioner cites *China Steel*, 264 F. Supp. 2d at 1365 and *Laclede Steel*, 19 C.I.T. at 1080.

⁸⁶ See BPI Memo at 9 (containing numeric analysis).

⁸⁷ The petitioner cites *Cemex, S.A. v. United States*, 133 F. 3d 897, 901 (CAFC 1998) (*Cemex*).

⁸⁸ The petitioner cites Overruns Memo at 4 (quoting *Monsanto Co. v. United States*, 698 F. Supp. 275, 278 (CIT 1988)).

⁸⁹ The petitioner cites SAA at 834.

⁹⁰ See *United States Steel Corp. v. United States*, 953 F. Supp. 2d 1332, 1341 (CIT 2013) (*US Steel*) (quoting *NSK Ltd. v. United States*, 170 F. Supp. 2d 1280, 1296 (CIT 2001)).

are not ordinary as compared to sales or transactions generally made in the same market. Examples of such sales or transactions include merchandise produced according to unusual product specifications, merchandise sold at aberrational prices, or merchandise sold pursuant to unusual terms of sale. As under existing law, amended section 771(15) does not establish an exhaustive list, but the Administration intends that Commerce will interpret section 771(15) in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results.⁹¹

Thus, we broadly possess the “discretion to determine what sales are outside the ordinary course of trade.”⁹²

With specific regard to “overrun” sales, we examine various factors to determine whether overrun sales are in the ordinary course of trade, including, but not limited to, the following: (1) whether the merchandise is “off-quality” or produced according to unusual specifications; (2) the comparative volume of sales and the number of buyers in the home market; (3) the average quantity of an overrun sale compared to the average quantity of a commercial sale; and (4) price and profit differentials in the home market.⁹³

Given the discretion afforded to us in conducting this analysis,⁹⁴ and considering the totality of the circumstances, we find POSCO’s sales of overrun merchandise to be outside the ordinary course of trade because these sales have characteristics that are different from those of sales generally made in the home market, as discussed *infra*.

As a preliminary matter, in the context of overrun products, we do not find instructive for our analysis POSCO’s claim that overrun sales are of prime grade material, have the same physical characteristics as non-overrun merchandise, and possess the same performance guarantees as non-overrun products. Because overruns are nothing more than excess production material and, thus, are indistinguishable within the production run, their quality parameters and physical attributes should not differ from those of prime material, the bulk quantity of which will go to satisfy a customer’s order.⁹⁵ In other words, if overruns are deemed non-prime, that means the entire production run was of non-prime material because the same chemistry and production processes were used throughout the production run dedicated to a specific order. In fact, of all the transactions POSCO reported for non-prime product, none were of overrun material. In any event, the fact that POSCO does not classify overrun products as non-prime merchandise does not, by itself, indicate that these sales should be considered in the ordinary course of trade. Our

⁹¹ See SAA at 834 (emphasis added).

⁹² See *US Steel*, 953 F. Supp. 2d at 1341 (citing, e.g., *Torrington Co. v. United States*, 146 F. Supp. 2d 845, 861 (CIT 2001), *aff’d*, 62 Fed. Appx. 950 (Fed. Cir. 2003)); see also *Laclede Steel*, 19 C.I.T. 1076, 1078 (CIT 1995).

⁹³ See, e.g., *CTL Plate Korea 2011-12 Prelim* and accompanying Preliminary Decision Memorandum at 7 (unchanged in *CTL Plate Korea 2011-12 Final*).

⁹⁴ See *Laclede Steel*, 19 CIT at 1078.

⁹⁵ POSCO explained that its general practice is to sell NOES produced to order; it produces NOES according to a planned schedule, and classifies the production volume that exceeds the intended schedule as overrun merchandise. See POSCO’s Section A response, dated January 22, 2014 (QRA) at A-24 and A-35.

finding that POSCO's overrun sales were made outside the ordinary course of trade was based on the totality of the factors that we examined and the record evidence that we considered.

Distinct Channel of Distribution

In its responses, POSCO reported that, through Internet "cyber transactions," by way of electronic auctions, it sells the remaining inventories, as well as non-prime merchandise. POSCO also stated that "the bidding procedure and sales negotiation process for POSCO's cyber transactions differ from traditional sales," and that "since the auctioned product is either overrun or non-prime products, the starting price is a price that is discounted from the base price."⁹⁶ Further, POSCO reported that "sometimes, products that are not sold in cyber sales can be sold offline if there is a customer who can use them. Normally, a customer that purchases overrun products offline processes them into non-subject merchandise and then sells the processed merchandise abroad. POSCO is aware that, in Asia, there are some customers who will accept overrun products."⁹⁷ On the basis of this information, in the *Preliminary Determination* we found that POSCO's sales of overrun NOES were made using a distinct channel of distribution with customer expectations and end uses that are different from those involving non-overrun sales.⁹⁸

POSCO disputes our conclusion that Internet auction sales (designated as Channel 3) are the only means by which POSCO sells overrun products. POSCO points to its analysis of home-market sales volumes made through each reported channel of distribution, which shows that overruns were also sold to end users in Channels 1 and 2; the volume of sales in the latter channels was nearly double the volume of sales in Channel 3. While we do not disagree with POSCO's belated assertion, in the *Preliminary Determination* we focused on the Internet auctions channel of distribution because that is the only channel POSCO mentioned when addressing overrun sales in its section A response and, consequently, we relied on POSCO's own descriptions of its channels of distribution and overrun sales.⁹⁹ Nevertheless, POSCO's analysis does not diminish the veracity of our conclusion that overrun sales were made using a unique channel of distribution because the record shows that POSCO's preferred means of disposing of overrun products is through Internet auctions. This is clear from POSCO's own statements on the record as well as from its data.¹⁰⁰

POSCO argues that the discounting of starting prices from base prices in the Internet auction transactions does not give rise to a finding of overrun sales constituting a separate channel of distribution. POSCO's description of the sales process associated with sales of overrun and non-prime merchandise through Channel 3 indicates that POSCO starts the Internet bidding at prices that are discounted from the base prices at which POSCO sells non-overrun prime products of same grade and thickness in Channel 1.¹⁰¹ POSCO provides an analysis of the minimum reported prices for overruns and non-overruns, by CONNUM, which POSCO asserts

⁹⁶ See QRA at A-24.

⁹⁷ See POSCO's supplemental questionnaire response, dated April 1, 2014 (SQR) at SA-13.

⁹⁸ See Overruns Memo at 3.

⁹⁹ See QRA at A-24 and SQR at SA-13.

¹⁰⁰ See BPI Memo at 11-12 (contains numeric analysis).

¹⁰¹ See QRA at A-24.

demonstrates that the starting prices for overruns are comparable to those for non-overruns for 75 percent of identical products sold in both groups. We are perplexed by POSCO's analysis because it is not clear, and POSCO does not explain: 1) how the reported prices at which the overrun products were actually sold equate to the starting prices; 2) whether its comparison of reported prices for overrun products and non-overrun products is on the same basis (it appears that POSCO's analysis compares base prices for non-overrun products with the winning-bid prices for overrun products; and 3) why it is appropriate to compare minimum prices in each group instead of average prices. Accordingly, we see nothing in POSCO's analysis that effectively disproves POSCO's original statements in its responses (that the starting price for cyber transactions is discounted from the base price);¹⁰² in fact, our analysis of POSCO's reported prices confirms POSCO's statements.¹⁰³ As such, POSCO's analysis does not compel us to reconsider our reliance on the comparison of average prices between the two groups of products. Notwithstanding, we merely relied on POSCO's own statements concerning the sales process associated with the overrun products in asserting that they were made using a distinct channel of distribution.

We agree with the petitioner that POSCO's own statements reveal that the production of overrun merchandise is not planned and, just like non-prime material, overruns are an unintended and undesirable consequence of ensuring the fulfillment of a customer's order in full.¹⁰⁴ Further, we agree with the petitioner that POSCO's description of all products sold through Channel 3 equates, in principle, overrun products with non-prime products in terms of their production being unplanned, unintended, and undesirable. POSCO describes overruns and non-prime products in the same breath, which makes any proposition that overrun sales should be compared to planned sales of prime products (that were made in the ordinary course of trade) insurmountable, in light of our practice of disallowing comparisons of prime and non-prime merchandise. Under these circumstances, the overruns take on the characteristics that are not ordinary as compared to sales generally made in the same market, as envisioned in the SAA.¹⁰⁵

Lastly, we agree with the petitioner's assertion that POSCO implicitly acknowledges that some customers will not accept overrun products, when it states that "some" Asian customers "will accept overrun products."¹⁰⁶ A refusal by certain customers to purchase overruns, even when the typical performance guarantees and quality assurances are provided, is a strong indication that overruns take on the characteristics that are not ordinary as compared to sales generally made in the same market, as contemplated in the SAA.¹⁰⁷ Further, POSCO implicitly acknowledges that there are certain limitations in the downstream use of overruns, when it states that "sometimes, products that are not sold in cyber sales can be sold offline if there is a customer who can use them."¹⁰⁸ POSCO's statement suggests that there are different customer expectations and end

¹⁰² *Id.*

¹⁰³ See Overruns Memo at 4.

¹⁰⁴ See QRA at A-24 ("{POSCO} produces subject merchandise according to a planned schedule, which raises the possibility that it will produce more than it intended (overruns) or that certain production will not meet the desired specifications (non-prime). POSCO's cyber transactions typically involve the sale of remaining inventories, as well as non-prime merchandise, through the Internet").

¹⁰⁵ See SAA at 834.

¹⁰⁶ See SQR at SA-13.

¹⁰⁷ See SAA at 834.

¹⁰⁸ See SQR at SA-13.

uses for overrun products that differ from those for non-overrun merchandise, another indication that overruns exhibit characteristics that are not ordinary.

Low Overall Volume and Small Number of Customers

In the *Preliminary Determination*, we found that overruns represent a relatively small portion of all home-market sales, by quantity, during the POI.¹⁰⁹ Relying on *Pipes from Romania* and accompanying IDM at Comment 14, POSCO asserts that our analysis should have properly focused on the comparison of sales volumes within individual product groups, instead of the overall volume comparisons, as we did in the *Preliminary Determination*, with respect to this factor of our analysis. POSCO's interpretation of *Pipes from Romania* is misplaced. There, we specifically acknowledged that "the relatively small number of sales in absolute terms is an important factor to consider in our overall evaluation of whether sales fall inside or outside the ordinary course of trade," stating, however, that this factor, in itself, is not dispositive of an affirmative finding; in addition to considering the relationship of sales to the total universe of home market sales, we also compared the volumes of individual sales in the different product groups.¹¹⁰ Further, as observed correctly by the petitioner, we previously rejected attempts to replace the overall volume analysis with the one that makes volume comparisons on a more narrow and tailored basis.¹¹¹ It is our practice to frequently rely upon low relative sales volumes as a factor in determining whether sales are outside the ordinary course of trade.¹¹² Our practice has been upheld by reviewing courts.¹¹³

POSCO presents an analysis which, it claims, shows that the overrun quantities for certain CONNUMs are very significant, however, POSCO's analysis is misleading. When eliminating CONNUMs which did not have sales of both, overrun or non-overrun products, POSCO's analysis really shows that there are fewer CONNUMs for which the total quantity of overruns exceeds allegedly 20 percent of the total volume of sales of respective CONNUMs. Second, and much more importantly, POSCO's analysis is heavily skewed toward CONNUMs with low sales volumes. If POSCO's analysis properly weighted the total sales volume for each CONNUM in relation to the total volume of sales, the percentages (*i.e.*, above 20) to which POSCO refers disappear.¹¹⁴

POSCO argues that we have long held that a small portion of sales, in and of itself, does not render a particular group of sales outside the ordinary course of trade. For its proposition, POSCO relies on two administrative cases, *Bars from Turkey* (and accompanying IDM at

¹⁰⁹ See Overruns Memo at 3.

¹¹⁰ See *Pipes from Romania*, and accompanying IDM at Comment 14.

¹¹¹ See *Cement from Mexico*, and accompanying IDM at Comment 7 ("We disagree with GCCC that we should compare sales volumes on the basis of average per-sale quantities sold to the same customer rather than comparing the total sales volumes during the POR. We find that the best way to compare the sales of CPO30R BRA cement to the sales or transactions generally made in the same market is to look at the total sales quantity of the product in question during the period under examination.").

¹¹² *Id.*, (citing *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 FR 18404 (April 15, 1997)).

¹¹³ See *Laclede Steel*, 19 C.I.T. at 1080; see also *Mantex, Inc. v. United States*, 841 F. Supp. 1290, 1308 (CIT 1993) (*Mantex*) ("...the Court finds Commerce properly relied on TISCO's low sales volume as one factor in determining whether the company's ASTM home market sales were outside the ordinary course of trade.").

¹¹⁴ See BPI Memo at 14 (contains numeric analysis).

Comment 1) and *Thermal Paper from Germany* (and accompanying IDM at Comment 2, and two judicial cases, *US Steel* and *Koyo Seiko*. These cases do not support finding POSCO's sales in the ordinary course of trade.

POSCO quotes *Bars from Turkey* and the accompanying IDM at Comment 1, when it asserts that "mere identification of sales as infrequent small quantity sales, without further explanation is insufficient to establish that the sales were made outside the ordinary course of trade." This quoted text is drawn from *Koyo Seiko Co. v. United States*, 932 F. Supp. 1488, 1498 (CIT 1996) where the court found it insufficient, without further explanation, to establish that certain sample, zero price, and infrequent small quantity sales were outside the ordinary course of trade. Thus, POSCO's reliance on *Bars from Turkey* and its quotation therefrom is misplaced, because it did not concern overrun sales and the court found that, aside from the small quantities involved, there wasn't sufficient record evidence to determine that sample sales were outside the ordinary course of trade.

POSCO also relies on *Thermal Paper from Germany*, for its proposition that the Department did not disregard sales of KT 48 F20 product as outside the ordinary course of trade because they comprised a relatively small portion of the respondent's home-market sales and were made pursuant to unusual terms of sale. POSCO itself acknowledges, however, that in that case the Department's finding was based on the examination of "the terms of sale and the sales trends of the products in question," as well as the evaluation of all of the circumstances particular to the sales in question" as to whether such "sales have characteristics that are extraordinary for the market in question."¹¹⁵ In this case, unlike in *Thermal Paper from Germany*, the totality of the record evidence shows POSCO's overrun sales were outside the ordinary course of trade based on the factors discussed herein.

POSCO relies on *US Steel* in asserting that the court affirmed the Department's determination to include a respondent's sales of non-temper rolled merchandise in the normal value calculations, notwithstanding the volume of such sales relative to sales of temper rolled merchandise, because substantial record evidence did not show that such sales were extraordinary or not representative of the market.¹¹⁶ Unlike that case, the record of this investigation based on the totality of the factors discussed herein demonstrates why POSCO's sales of overruns are not representative of the market.

POSCO relies on *Koyo Seiko* in asserting that the court upheld the Department's determination that small quantity sales were within the ordinary course of trade. In that case, the court found that the Department's decision to consider sample sales within the ordinary course of trade was reasonable because the Department did not receive any specific evidence to the contrary.¹¹⁷ POSCO's reliance on *Koyo Seiko* is misplaced because that case did not concern overrun sales and, unlike that case, the totality of the record evidence of this investigation demonstrates why POSCO's sales of overruns are outside the ordinary course of trade. In sum, concerning POSCO's reliance on two administrative and two judicial cases, we did not determine that POSCO's overrun sales are outside the ordinary course of trade solely because of the relatively

¹¹⁵ See *Thermal Paper from Germany*, and accompanying IDM at Comment 2.

¹¹⁶ See *US Steel*, 953 F. Supp. 2d at 1332.

¹¹⁷ See *Koyo Seiki*, 186 F. Supp. 2d at 1349.

small quantity involved; instead, we undertook a comprehensive analysis of record evidence based on the factors discussed herein and determine based on the totality of the evidence that these overrun sales are outside the ordinary course of trade.

POSCO argues that the number of customers that purchased overrun products as a proportion of total home-market customers was significant. We find it misleading, however, to combine the number of customers that purchased overrun products exclusively with the number of customers that purchased both overrun and non-overrun products without taking into consideration the total volume of overrun and non-overrun purchases. Concerning customers that purchased both, overrun and non-overrun products, the volume of overrun purchases was a low percentage of the total volume.¹¹⁸ The data show that POSCO's analysis greatly understates the extent to which customers (purchasing both overrun and non-overrun merchandise) were purchasers of non-overrun products.¹¹⁹

Average Sale Quantity

In the *Preliminary Determination*, we found that, on the basis of identical CONNUMs, the average quantity of an overrun sale of NOES as compared to the average quantity of a non-overrun sale of NOES demonstrated that the overrun sales were outside the ordinary course of trade, including when considered on a weighted-average basis across all identical CONNUMs.¹²⁰

POSCO claims that we have not explained why these quantity differences render the overrun sales outside the ordinary course of trade. However, we explained in the *Preliminary Determination* that "...the statute and the SAA are clear that a determination of whether sales...are in the ordinary course of trade must be based on an analysis comparing the sales in question with sales of merchandise of the same class or kind generally made in the home market.... The purpose of the ordinary-course-of-trade provision "'is to prevent dumping margins from being based on sales which are not representative' of the home market. By basing the determination of {normal value} upon representative sales, the statutory provision ensures that the comparison between {normal value} and sales to the United States is done on an 'apples-to-apples' basis.'" ¹²¹ The fact that POSCO's overrun transactions involve smaller sale quantities was a factor that informed our decision in the *Preliminary Determination* that overruns are not representative of POSCO's normal trade in the home market.

We agree with the petitioner that the identified quantity differential between overruns and non-overruns is material in the context of POSCO's normal course of operations and for determining whether overrun sales are made in the ordinary course of trade.¹²²

POSCO presents an analysis which, it claims, shows that 25 percent of the home market sales of prime non-overrun products were in quantity ranges comparable to overrun products. While we

¹¹⁸ See BPI Memo at 15 (contains numeric analysis).

¹¹⁹ *Id.*

¹²⁰ *Id.* (reiterates numeric analysis discussed in the Overruns Memo).

¹²¹ See Overruns Memo at 2 (citing *Monsanto Co. v. United States*, 698 F. Supp. 275, 278 (CIT 1988)).

¹²² See BPI Memo at 16 (contains BPI discussion of certain factors concerning sales of overruns that we find indicative of characteristics that are not ordinary as compared to transactions generally made in the home market).

do not dispute POSCO's claim, POSCO's analysis merely shows an overlap in low quantity ranges between overrun and non-overrun transactions (*i.e.*, the majority of overlap, by number of transactions, occurs in the following quantity ranges: 4-5 MT, 5-6 MT, 6-7 MT, and 7-8 MT). Of course there will always be some level of overlap in the quantities sold in both groups of products; POSCO's own analysis shows, however, that there is no overlap in quantity between overruns and non-overruns for a majority of non-overrun transactions, *i.e.*, 75 percent of sales. Further, the overlap in quantity ranges that POSCO identified represents only a small percent, by volume, of prime non-overrun transactions.¹²³ Notwithstanding, our practice, which has been affirmed by the courts,¹²⁴ makes it clear that one of the dispositive factors that we consider in evaluating whether sales of overrun merchandise are outside the ordinary course of trade is the comparison of the average quantity of the overrun and commercial sales, which is exactly what we did in the *Preliminary Determination*.

Prices and Profits

In the *Preliminary Determination*, we addressed the price differences between POSCO's sale of overrun merchandise and non-overrun merchandise. We compared the weighted-average net unit prices of overrun and non-overrun sales of NOES on a CONNUM-specific basis. Both on a weighted-average basis across each identical CONNUM, and on a weighted-average basis across all identical CONNUMs (weighted by overrun quantity), we found that the average net unit price differentials demonstrate that the overrun sales were made outside the ordinary course of trade.¹²⁵

POSCO argues that the use of overall averages may sometimes mask patterns and not account for outliers that may distort the calculations; POSCO argues that a more appropriate analysis should focus on the comparison of minimum prices. As a preliminary matter, POSCO does not elaborate on its assertions, nor does it demonstrate in any way what patterns were masked or what outliers were not accounted for by our analysis in the *Preliminary Determination*; POSCO makes no effort to show how our use of average price comparisons was allegedly distortive. Further, as we explained *supra*, POSCO does not explain why, among others, it is appropriate to compare minimum prices instead of average prices, as we have done in our analysis. Furthermore, we agree with the petitioner that POSCO's objections to our use of average prices in our analysis, ignores controlling precedent in which the courts approved the use of overall averages.¹²⁶

In the *Preliminary Determination* we addressed the profit levels of overrun and non-overrun sales and profit differentials between POSCO's sales of both groups of products on a weighted-

¹²³ *Id.* (contains numeric analysis).

¹²⁴ See Overruns Memo at 2 (citing *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review*, 70 FR 67428, 67430 (November 7, 2005), unchanged in *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 71 FR 13080 (March 14, 2006) and *China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1364-65 (CIT 2003), *aff'd on remand China Steel Corp. v. United States*, 306 F. Supp. 2d 1291 (CIT 2004)); see also *Laclede Steel*, 19 C.I.T. at 1080 and *Mantex*, 841 F. Supp. at 1295.

¹²⁵ See BPI Memo at 17 (reiterates numeric analysis discussed in the Overruns Memo).

¹²⁶ See *China Steel*, 64 F. Supp. 2d at 1364, *Laclede Steel*, 19 C.I.T. at 1080, and *Mantex*, 841 F. Supp. at 1295.

average basis across each identical CONNUM and on a weighted-average basis (weighted by overrun quantity) across all identical CONNUMs; we found that the profit differentials demonstrate that the overrun sales were made outside the ordinary course of trade.¹²⁷ In the BPI Memo, we address POSCO's argument concerning profitability of certain CONNUMs that makes extensive use of business proprietary information.¹²⁸ In short, we find that POSCO's argument does not negate our overall finding of profit differentials between overrun and non-overrun products.¹²⁹ Further, the Courts found the disparity in profit levels an important factor in determining that certain sales were made outside the ordinary course of trade.¹³⁰ The pricing and profit analyses that we undertook in the *Preliminary Determination* indicate that POSCO's overrun transactions have characteristics that are not ordinary as compared to transactions generally made in the same market.

Lastly, POSCO argues that section 773(b)(1) of Act separately provides the means to eliminate overrun sales that were made below the cost of production, as being outside the ordinary course of trade. POSCO is incorrect. As an initial matter, section 771(15) of the Act makes clear that sales below the cost of production within the meaning of section 773(b)(1) of the Act are "among" the types of sales which the Department may find outside the ordinary course of trade, but not the only kinds of sales which are outside the ordinary course of trade.

Further, the courts found that "...sales do not have to be below cost in order for a profit margin to diverge from 'the conditions and practices which . . . have been normal in the trade under consideration with respect to merchandise of the same class or kind'...the language contained in {section 771(15) of the Act} permits Commerce to analyze a respondent's profit level *relative to* the profits normally realized in connection with the 'merchandise of the same class or kind' to which Commerce compares the respondent's merchandise."¹³¹ As such, in this investigation we met the standard of demonstrating the divergence in profit levels between overrun and non-overrun merchandise. Therefore, differences in profit levels between the sales of overrun and non-overrun merchandise are not predicated on whether the sales of overrun merchandise were made below the cost of production or whether the sales of overrun merchandise are disregarded because they are priced below their cost of production.

In sum, we agree with the petitioner that our evaluation of POSCO's sales of overruns within the context of sections 773(a)(1)(B) and 771(15) of the Act was based on application of a longstanding and judicially-approved methods of analysis of record evidence, and is supported by substantial record evidence. We see nothing in POSCO's comments that effectively discredits our finding in the *Preliminary Determination* that POSCO's sales of overrun products are sales there were made outside the ordinary course of trade.

¹²⁷ See BPI Memo at 17-18 (reiterates numeric analysis discussed in the Overruns Memo).

¹²⁸ *Id.* at 18 (contains numeric analysis).

¹²⁹ *Id.*

¹³⁰ See *Mantex*, 841 F. Supp. at 1308 ("Profit level is clearly one of several significant 'conditions . . . in the trade under consideration' within the meaning of {section 771(15) of the Act}. Moreover, a profit level comparison is probative of the economic reality of the trade in merchandise under review. As a result, the Court finds Commerce's comparison of profit levels between TISCO's ASTM and IS pipe sales was reasonable and in accordance with law."); see also *Cemex*, 133 F. 3d at 901 ("...the disparity in profit margins is indicative of sales that were not in the ordinary course of trade.").

¹³¹ See *Mantex*, 841 F. Supp. at 1308 (quoting section 771(15) of the Act) (emphasis in original).

Comment 3: Denial of Offsets for Non-Dumped Sales When Using the Average-to-Transaction Method as an Alternative Comparison Methodology

POSCO makes a number of arguments supporting its position that if the Department resorts to the use of the average-to-transaction comparison methodology in the final determination, it would be contrary to law for the Department to disallow offsets for non-dumped sales when computing POSCO's estimated weighted-average dumping margin.

The petitioner argues that the Department should employ the average-to-transaction comparison method in the final determination if, as a result of other changes to the margin program, there arises a "meaningful difference" in the estimated weighted-average dumping margins calculated using the average-to-average and average-to-transaction comparison methods; if there is no such "meaningful difference" and the Department continues to apply the average-to-average method, as it did in the *Preliminary Determination*, then POSCO's arguments are moot and need not be addressed in the final determination.¹³²

Department's Position: In this final determination, we applied the average-to-average comparison method with offsets for non-dumped sales to calculate the weighted-average dumping margin for POSCO. Accordingly, this issue is moot.


VII. RECOMMENDATION

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

✓

Agree

Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

6 OCTOBER 2014
(Date)

¹³² The petitioner cites *Certain Oil Country Tubular Goods From the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014) and accompanying IDM at Comment 4.