




A-580-880  
Investigation  
POI: 7/1/2014 – 6/30/2015  
Public Document  
E&C/Office II: AM

DATE: July 14, 2016

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
For Enforcement and Compliance

FROM: Christian Marsh   
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 Heavy  
Walled Rectangular Welded Carbon Steel Pipes and Tubes from  
the Republic of Korea

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### Summary

We analyzed the comments of the interested parties in the less-than-fair-value (LTFV) investigation of heavy walled rectangular welded carbon steel pipes and tubes (HWR pipes and tubes) from the Republic of Korea (Korea). As a result of our analysis, and based on our findings at verification, we made changes to the margin calculations for Dong-A Steel Company (DOSCO) and HiSteel Co., Ltd (HiSteel), the two mandatory respondents in this case. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this LTFV investigation for which we received comments from interested parties:

### General Comments

1. U.S. Date of Sale
2. Weight Basis for Comparison Methodology
3. Costs for Non-Prime Merchandise
4. Differential Pricing Rulemaking
5. Differential Pricing Analysis
6. Verification Corrections

## Company- Specific Comments

### DOSCO

7. DOSCO's Constructed Export Price (CEP) Offset Claim
8. Raw Material Costs for DOSCO

### Background

On March 1, 2016, the Department of Commerce (the Department) published the Preliminary Determination of sales of HWR pipes and tubes from Korea at LTFV.<sup>1</sup> The period of investigation (POI) is July 1, 2014, through June 30, 2015.

In February and March 2016, the Department conducted verification of the sales and cost data reported by DOSCO and HiSteel, in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act).<sup>2</sup>

We invited parties to comment on the Preliminary Determination. In April 2016, the petitioners,<sup>3</sup> DOSCO, and HiSteel submitted case and rebuttal briefs. In May, we held a public hearing at the request of the petitioners and DOSCO.

Based on our analysis of the comments received, as well as our verification findings, we revised the weighted-average dumping margins for DOSCO and HiSteel from those calculated in the Preliminary Determination.

### Scope of the Investigation

The products covered by this investigation are certain heavy walled rectangular welded steel pipes and tubes of rectangular (including square) cross section, having a nominal wall thickness of not less than 4 mm. The merchandise includes, but is not limited to, the American Society for Testing and Materials (ASTM) A-500, grade B specifications, or comparable domestic or foreign specifications.

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<sup>1</sup> See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 81 FR 10585 (March 1, 2016) (Preliminary Determination), and accompanying Preliminary Decision Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, entitled "Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea (Korea)" (Preliminary Decision Memorandum).

<sup>2</sup> In April 2016, we requested that DOSCO submit revised home market and U.S. sales databases and a revised cost of production (COP) database to reflect minor corrections made at verification; we received the revised databases in this same month.

<sup>3</sup> The petitioners in this investigation are Atlas Tube, a division of JMC Steel Group; Bull Moose Tube Company; EXLTUBE; Hannibal Industries, Inc.; Independence Tube Corporation; Maruichi American Corporation; Searing Industries; Southland Tube; and Vest, Inc.

Included products are those in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements below exceeds the quantity, by weight, respectively indicated:

- 2.50 percent of manganese, or
- 3.30 percent of silicon, or
- 1.50 percent of copper, or
- 1.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 2.0 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.80 percent of molybdenum, or
- 0.10 percent of niobium (also called columbium), or
- 0.30 percent of vanadium, or
- 0.30 percent of zirconium.

The subject merchandise is currently provided for in item 7306.61.1000 of the Harmonized Tariff Schedule of the United States (HTSUS). Subject merchandise may also enter under HTSUS 7306.61.3000. While the HTSUS subheadings and ASTM specification are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

### Margin Calculations

We calculated export price (EP), CEP, and normal value (NV) using the same methodology stated in the Preliminary Determination,<sup>4</sup> except as follows:

1. We revised our margin calculations for DOSCO and HiSteel to take into account our findings from the sales and cost verifications.<sup>5</sup> See Comment 6.

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<sup>4</sup> See Preliminary Determination, and accompanying Preliminary Decision Memorandum, at 4 - 7.

<sup>5</sup> See Memorandum to the File from Alice Maldonado and Elizabeth Eastwood, Senior Analysts, and Whitley Herndon, Analyst, entitled, "Verification of the Sales Response of DOSCO America, Inc. in the Antidumping Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea," dated April 6, 2016 (DOSCO America Verification Report); Memorandum to the file from Alice Maldonado and Elizabeth Eastwood, Senior Analysts, and Whitley Herndon, Analyst, entitled, "Verification of the Sales Response of Dong-A Steel Company in the Antidumping Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea," dated April 8, 2016 (DOSCO Sales Verification Report); Memorandum to the File, from Heidi K. Schriefer and Kristin Case, Senior Accountants, entitled, "Verification of the Cost Response of Dong-A Steel Company in the Antidumping Duty Less Than Fair Value Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea," dated April 5, 2016 (DOSCO Cost Verification Report); Memorandum to the file from Elizabeth Eastwood and Alice Maldonado, Senior Analysts, and Whitley Herndon, Analyst, entitled, "Verification of the Sales Response of HiSteel Co., Ltd. in the Antidumping Duty Investigation of Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea," dated April 6, 2016 (HiSteel Sales Verification Report); and Memorandum to the File, from Kristin L. Case, Senior Accountant, entitled, "Verification of the Cost Response of HiSteel Co., Ltd. in the Less-Than-Fair-Value Investigation of Heavy Walled Rectangular

2. We recalculated DOSCO's home market credit expenses, as well as its home market and U.S. indirect selling expenses, based on our findings at verification.<sup>6</sup> See Comment 6.
3. We recalculated DOSCO's cost of production to include additional hot-rolled coil costs reported in DOSCO's latest cost database.<sup>7</sup> See Comment 8.

## Discussion of the Issues

### Comment 1: U.S. Date of Sale

In the Preliminary Determination, we used the earlier of the invoice date or the shipment date for DOSCO's and HiSteel's home market and U.S. dates of sale, in accordance with our practice.<sup>8</sup> The petitioners argue that the Department should instead use the date of the purchase order because: 1) under the Department's regulations, the Department may use a different date if it better reflects when the respondent establishes the material terms of sale;<sup>9</sup> 2) both respondents intended the terms of sale to be final as of that date; and 3) sales documentation submitted by both respondents demonstrates that there were no changes to the materials terms of sale after the purchase order date.<sup>10</sup>

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Welded Carbon Steel Pipes and Tubes from the Republic of Korea," dated April 6, 2016 (HiSteel Cost Verification Report).

<sup>6</sup> See the Memorandum to the File from Alice Maldonado, Senior Analyst, entitled, "Final Determination Calculation for Dong-A Steel Company (DOSCO)," dated July 14, 2016 (DOSCO Final Calculation Memo). See also DOSCO Sales Verification Report, at 15 – 16 and verification exhibit 24.

<sup>7</sup> See the Memorandum to the File from Heidi Schriefer, Senior Accountant, entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Dong-A Steel Company," dated July 14, 2016 (DOSCO Final Cost Calculation Memo).

<sup>8</sup> See, e.g., Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52065 (September 12, 2007) (Thai Shrimp AR1), and accompanying Issues and Decision Memorandum at Comment 11; see also Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Germany, 67 FR 35497 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>9</sup> The petitioners cite Rebar Trade Action Coal. v. United States, Slip Op. 15-130, 2015 U.S. Court of International Trade (CIT) LEXIS 132, \*29-30 & n.5 (November 23, 2015) (Rebar Trade Action v. United States) (citing Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review: 2011-2012, 78 FR 65272 (October 31, 2013), and accompanying Issues and Decision Memorandum at Comment 6 (finding contract date or amended contract date, as applicable, to be the date of sale); Notice of Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from Portugal, 67 FR 60219 (September 25, 2002), and accompanying Issues and Decision Memorandum at Comment 1 (finding contract date to be date of sale despite contract renegotiation after certain production quantities could not be met); Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 63 FR 32833, 32836 (June 16, 1998) (choosing contract date as date of sale despite subsequent changes including changes to material terms of sale); and Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 65 FR 60910 (October 13, 2000), and accompanying Issues and Decision Memorandum at Comment 1 (selecting contract date as date of sale despite quantity changes).

<sup>10</sup> The petitioners cite HiSteel's September 8, 2015, Section A Response (HiSteel Section A Response), at 21 and Appendix A-6-B; and DOSCO's December 4, 2015, Supplemental Sections A-C Response, at 3 and Exhibit SA-4.

The petitioners acknowledge that the record does not contain purchase order information for either respondent. Thus, they request that the Department either: 1) request additional information; or 2) adjust the reported sale dates using facts available to account for the difference between the respondents' purchase order dates and their reported sale dates.

DOSCO and HiSteel disagree that the purchase order date is the appropriate date of sale for their reported sales. HiSteel contends that the petitioners' claim that its sample sales documents show the quantities to be within the tolerances shown on the purchase orders is simply not supported by the facts on the record. HiSteel maintains that, contrary to the petitioners' argument, these documents, as well as additional documents provided at verification, demonstrate that there were in fact sales for which the ordered quantity differed from the shipment quantity by substantially more than the tolerance permitted.<sup>11</sup>

DOSCO similarly maintains that the petitioners' arguments are inconsistent with both the verified factual record and the Department's well-established practice governing the date of sale. Specifically, DOSCO asserts that the Department has consistently found that the date of factory shipment is the appropriate date of sale if the merchandise is shipped prior to the issuance of the invoice because this date better reflects when the material terms of sale are finalized.<sup>12</sup> DOSCO contends that the petitioners' analysis incorrectly focuses only on the fact that the price did not change between order date and factory shipment date.<sup>13</sup> However, DOSCO notes that its customer correspondence reveals changes to the ordered quantities, and, thus, documents on the record clearly demonstrate that the materials terms of sale could, and did, change prior to the shipment date.<sup>14</sup>

DOSCO states that Rebar Trade Action v. United States is factually distinct, given that the Court of International Trade (CIT) in that case found no material changes in the terms of sale between

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The petitioners note that certain items on these orders were either shipped at a later date or were reduced in volume. However, they contend that the sales shipped pursuant to the orders were within the allowable tolerances.

<sup>11</sup> HiSteel cites HiSteel Section A Response, at Appendix A-6-B and HiSteel Sales Verification report at verification exhibit 17.

<sup>12</sup> As support for this assertion, DOSCO cites Certain Corrosion-Resistant Steel Products from Taiwan: Negative Preliminary Determination of Sales at Less Than Fair Value, 81 FR 72 (January 4, 2016), and accompanying Preliminary Decision Memorandum at 10; Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review 2013-2014, 81 FR 742 (January 7, 2016), and accompanying Preliminary Issues and Decision Memorandum, at 6-7; and Seamless Refined Copper Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 35244 (June 12, 2013), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>13</sup> DOSCO notes that the Department considers "material terms of sale" to include both quantities and products, citing Polyvinyl Alcohol from Taiwan: Final Determination of Sales at Less Than Fair Value, 76 FR 5562 (February 1, 2011), and accompanying Issues and Decision Memorandum at Comment 3. DOSCO also argues that the regulations' reference to "material terms of sale" further demonstrates that price is not considered to be the only material term of sale, citing 19 CFR 351.401(i) (emphasis added).

<sup>14</sup> DOSCO notes that the petitioners' argument in essence is that the Department should ignore line items in any given order that were canceled. DOSCO claims that this argument is absurd.

the order confirmation and invoice dates.<sup>15</sup> In contrast, DOSCO maintains that here changes occurring after the order confirmation date demonstrate that DOSCO's U.S. affiliate, DOSCO America, and its customers did not intend for the terms to be final as of the order confirmation date. Finally, DOSCO contends that there is no factual or legal basis in this proceeding for the Department to make any facts available adjustment, as proposed by the petitioners.

#### Department's Position:

For this final determination, we continue to find that the earlier of factory shipment date or invoice date correctly reflects the date on which the material terms of DOSCO's and HiSteel's U.S. sales are finalized. The Department's regulations at 19 CFR 351.401(i) direct the Department to define the date of sale as the date on which the material terms of sale are established. Specifically, 19 CFR 351.401(i) states:

In identifying the date of sale of the subject merchandise or the foreign like product, the Secretary will normally use the date of invoice, as recorded in the exporter or producer's record kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

The CIT has held that the material terms of sale normally include the price, quantity, delivery terms, and payment terms.<sup>16</sup> As noted in the Preliminary Determination, the Department has a longstanding practice of finding that, where the shipment date precedes the invoice date, the shipment date better reflects the date on which the material terms of sale are established.<sup>17</sup> HiSteel reported the date of invoice to the first unaffiliated customer as the date of sale for all of its U.S. sales, while DOSCO reported the date of shipment from the factory in Korea for CEP sales and the date of invoice for EP sales.<sup>18</sup> Both respondents reported that the prices and/or quantities can and do change after the date of the initial order and both provided documentation demonstrating that changes to the material terms of sale which exceeded the allowable tolerance occurred after the order date.<sup>19</sup> Based on the documentation on the record, we find that one of the material terms of sale (*i.e.*, quantity) stated in both DOSCO's and HiSteel's purchase orders can and did, in fact, change during the POI.

We disagree with the petitioners that the purchase order date represents a better date of sale than the earlier of the shipment date or the invoice date. In analyzing the changes between order date

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<sup>15</sup> DOSCO cites Rebar Trade Action v. United States, where the Department determined the material terms of sale were set upon invoicing; the Court remanded the determination after finding that "no invoices reflected material terms of sale different from those in the respondent's purchase orders/contracts, citing Slip-Op 15-130, at 18-19.

<sup>16</sup> See USEC Inc. United States, 31 CIT 1049, 1055 (CIT 2007).

<sup>17</sup> See Preliminary Determination, and accompanying Preliminary Decision Memorandum, at 7 - 8.

<sup>18</sup> See DOSCO's Sections B - D Response at C-16; and HiSteel's Sections B and C Response at 49.

<sup>19</sup> See DOSCO's October 13, 2015, Section A response (DOSCO Section A response), at A-23 – A-24; DOSCO's January 5, 2016, Supplemental Sections A-C response (DOSCO Supplemental Sections A-C Response), at 3 and Exhibit SA-4; HiSteel's October 13, 2015, Supplemental Section A response, at 21; HiSteel Section A Response, at Appendix A-6-B; and HiSteel Sales Verification Report, at verification exhibit 17.

and the factory shipment/invoice, we find that the portion of any given order that never shipped is a change to the quantity originally ordered by the customer. Therefore, we find that the documentation on the record reflects changes to the material terms of sale after the purchase order date, thus demonstrating that the order date is not the actual date on which the material terms of sale are established, pursuant to 19 CFR 351.401(i). In light of this, we find that the petitioners' reliance on Rebar Trade Action v. United States is misplaced.

Comment 2: Weight Basis for Comparison Methodology

DOSCO and HiSteel reported both the theoretical weight of their finished products, as well as a calculated "actual" weight based on the dimensions of the coil used to produce them. In the Preliminary Determination, we based the sales and production quantity used in our analysis on theoretical weight because neither respondent weighs its products after production or prior to shipment. Thus, we found that neither was able to report the actual weight of those products, despite a claim by DOSCO that the calculated "actual" weight was equivalent to the weighed quantity.

DOSCO disagrees with the Department's use of theoretical weight as the basis for the preliminary calculations and maintains that using the calculated "actual" weight is the most reasonable and accurate method to measure and compare prices, expenses, and costs in the two markets. DOSCO notes that the Act's mandate is to ensure a fair comparison between U.S. price and NV and that it is the Department's responsibility to eliminate distortions in order to calculate antidumping duty margins as accurately as possible.<sup>20</sup> According to DOSCO, in this case, making fair comparisons means ensuring that all prices, expenses, and production costs are stated and compared on the same weight basis. DOSCO asserts that the Department's conversions of the calculated "actual" weight to a theoretical basis in the Preliminary Determination led to distorted price comparisons and resulted in inaccurate margin calculations.

DOSCO asserts that the Department verified that both "actual" and theoretical weights are calculated using the same standard industry formula, with the only difference being the value used for the "thickness" component.<sup>21</sup> According to DOSCO, the calculated "actual" weight more closely approximates the real weight of the HWR pipe and tube, were DOSCO to physically weigh it, because that weight is based on the actual wall thickness of the input coil (*i.e.*, the same wall thickness as the finished HWR pipe and tube). DOSCO argues that, because the theoretical weight calculation is based on the finished HWR pipe and tube nominal wall thickness which is always subject to a tolerance, the wall thickness used in the calculation will never be the actual wall thickness of the finished HWR pipe and tube received by the customer.

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<sup>20</sup> DOSCO cites 19 U.S.C. 1677b(a); Smith-Corona Group v. United States, 713 F.2d 1568, 1578 (CAFC 1983); Television Receiving Sets, Monochrome and Color from Japan: Final Results of Administrative review of Antidumping Finding, 50 FR 24278 at Comment 1 (June 10, 1985) (stating that one of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis - comparing apples with apples); and Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review, 76 FR 59999 (September 28, 2011), and accompanying Issues and Decision Memorandum at Comment 5.

<sup>21</sup> DOSCO notes that the calculation for weight as stated in the specifications for HWR pipes and tubes is:  $0.0157 \times \text{Thickness} \times (\text{Perimeter} - 3.287 \times \text{Thickness})$ , citing DOSCO Section A response, at A-31 – A-32.

DOSCO notes that thickness of the input coil is based on mill test certificates issued by the coil supplier which: 1) list the coil actual thickness along with the weight (based on physical weighing); and 2) include a supplier guarantee that the coil reflects the reported information, including the wall thickness. DOSCO maintains that this information is in fact the actual measured thickness of the coil determined through continuous testing (with negligible overall differences at the second decimal point).<sup>22</sup> DOSCO contends that it does not possess equipment to either press the hot-rolled coils or make the output thinner than the input, thus demonstrating that the actual thickness of the coil remains intact throughout the process of slitting the coil into skelp and forming of the finished pipe.<sup>23</sup>

DOSCO maintains that it strictly follows its established operating standards to produce HWR pipes and tubes which specify the actual coil thickness required to produce a particular HWR pipe and tube theoretical wall thickness.<sup>24</sup> According to DOSCO, the customer will always receive HWR pipe and tube with an actual wall thickness that is less than the nominal thickness and, thus, the calculated “actual” weight is less than the theoretical weight. DOSCO maintains that most customers are aware of this practice and order HWR pipe and tube accordingly.<sup>25</sup> Therefore, DOSCO maintains that it considers the calculated “actual” weight when it negotiates selling prices with its customers and, therefore, this weight better reflects the basis on which DOSCO sets prices with its U.S. customers.

DOSCO notes that the Department has departed from the weights shown on the U.S. invoice in other cases in order to achieve a consistent comparison, and it should follow that practice here.<sup>26</sup> DOSCO contends that theoretical weight is not a consistent unit of measure and will introduce distortions because: 1) companies calculate theoretical weight differently for the same product

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<sup>22</sup> As support for this assertion, DOSCO cites DOSCO Cost Verification Report at verification exhibit 12; DOSCO Sales Verification Report at verification exhibits 9-22; and DOSCO America Verification Report at verification exhibits 8-13.

<sup>23</sup> DOSCO cites DOSCO Sales Verification Report, at 10.

<sup>24</sup> DOSCO cites DOSCO’s Section C response at Exhibit C-21; DOSCO Sales Verification Report, at verification exhibit 8; and DOSCO America Verification Report, at verification exhibit 7.

<sup>25</sup> As support for this assertion, DOSCO cites DOSCO Sales Verification Report, at verification exhibit 8.

<sup>26</sup> DOSCO cites Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 46584 (August 11, 2008), and accompanying Issues and Decision Memorandum at Comment 11 (where the Department considered whether to value respondent Fischer’s sales on a pounds solid basis or on a gallon basis) (citing Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, 64 FR 38756, 38781 (July 19, 1999), in which the Department converted a respondent’s U.S. sales from a theoretical weight basis to an actual-weight basis for comparison purposes, despite the fact that U.S. sales were priced by theoretical weight). DOSCO asserts that the Department has developed a methodology to ensure that all prices, expenses, and costs are stated on a consistent basis, even where doing so causes a departure from the quantities and prices as stated on the invoices, citing Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination, 76 FR 40881 (July 12, 2011), and accompanying Issues and Decision Memorandum at Comment 6; and Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India, 69 FR 76916 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 13.



due to rounding;<sup>27</sup> and 2) there are different established tolerances for HWR pipe and tube thickness (used in the calculation of theoretical weight) between the U.S. and foreign markets.<sup>28</sup> As such, DOSCO maintains that the calculated “actual” weight is the most reasonable and consistent unit of measure because: 1) DOSCO calculates “actual” weight in the same manner for all sales regardless of the market; and 2) the calculated “actual” weights are found in DOSCO’s production and sales records.<sup>29</sup>

Finally, DOSCO contends that, contrary to the petitioners’ claim (see below), the Department does not have a preference for theoretical weight-based calculations. DOSCO argues that that not only are the cases cited by the petitioners outdated, but the two more recent cases merely demonstrate that the Department seeks to ensure that all data are stated on the same weight basis, with no established preference for theoretical weight or actual weight.<sup>30</sup>

HiSteel asserts that there is no evidence on the record of this case that HiSteel’s theoretical or calculated “actual” weights are any more or less theoretical or actual than those reported by other respondents. Consequently, HiSteel argues that the Department must employ a consistent methodology for all respondents with respect to the weight basis it uses for the final determination.

The petitioners argue that the Department should continue to base the comparison methodology on theoretical weights for the final determination. The petitioners maintain that, contrary to DOSCO’s assertion, the Department has a long-standing preference for using theoretical weight as the basis for its pricing comparisons for pipe and tube products.<sup>31</sup> For example, the petitioners note that, in Welded Steel Pipe from Korea, the Department stated:

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<sup>27</sup> DOSCO notes that some of its customers require it to use on the invoices the customer’s theoretical weight rather than DOSCO’s theoretical weight, citing to DOSCO Sales Verification Report, at 10 and verification exhibit 8.

<sup>28</sup> DOSCO cites DOSCO Section A Response, at A-23.

<sup>29</sup> DOSCO cites DOSCO Sales Verification Report, at 10 and 13-14, and verification exhibits 6, 9-14, 19, and 20; DOSCO America Verification Report, at 7 and 9-10 and verification exhibits 8-13; and DOSCO Cost Verification Report, at 15 (observing that both actual weight and theoretical weight are calculated and maintained in the production ledgers.).

<sup>30</sup> DOSCO cites Certain Cut-to-Length Carbon-Quality Steel Plate Products from Italy: Final Results of Antidumping Duty Administrative Review, 75 FR 47777 (August 9, 2010), and accompanying Issues and Decision Memorandum (where the Department converted the U.S. sales data from a theoretical weight basis to an actual weight basis to be consistent with the home market sales data and cost of production data); 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) (OCTG from Ukraine), and accompanying Issues and Decision Memorandum (where the Department agreed that the home market and U.S. market weights should all be reported on the same basis, whether that be theoretical or actual); and Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review, 67 FR 6490 (February 12, 2002), and accompanying Issues and Decision Memorandum at Comment 18 (where the Department converted the respondent’s sales data from a theoretical weight basis to an actual weight basis).

<sup>31</sup> As support for this assertion, the petitioners cite Certain Welded Stainless Steel Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value, 57 FR 53693 (November 12, 1992) (Welded Steel Pipe from Korea); Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 57 FR 17885 (April 28, 1992) (“We made sales comparisons on the basis of theoretical weight, the weight basis on which respondents reported that U.S. sales were made.”); and Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Final Determination of Sales at Less

Given the Department's general preference for making sales comparisons on the basis on which U.S. sales were made, we made comparisons on the basis of theoretical weight. The use of theoretical weight as the basis for comparison purposes is consistent with the Department's practice with respect to pipe and tube cases (emphasis added by petitioners).<sup>32</sup>

The petitioners disagree that the fact that such precedent is over a decade old invalidates it; rather, they claim these cases confirm the Department's longstanding preference for using the sales basis in the United States for its comparisons, especially with regard to pipe and tube cases.

The petitioners find DOSCO's reliance on OCTG from Ukraine to be misplaced because in that case the issue was not actual versus theoretical weight, but rather that data must be on the same basis to make a proper comparison. Further, the petitioners assert that case precedent involving products other than pipe and tube is irrelevant, given that the record of this investigation demonstrates that pipe and tube products are sold in the United States on the basis of theoretical weight.<sup>33</sup> Similarly, the petitioners contend that the preliminary determinations in the companion investigations of HWR pipes and tubes from Turkey and Mexico do not support DOSCO's argument because: 1) there were inconsistencies in those cases that will need to be resolved in a uniform manner for the final determinations; 2) preliminary determinations are subject to further argument and reconsideration; and 3) the actual weights reported in the Turkey and Mexico cases were based on scale weights. Therefore, the petitioners maintain that actual weights in the companion HWR pipe and tube cases are fundamentally different than the calculated "actual" weights in this case, given that the products are weighed in the other cases whereas in this case weights are based on a formula.

Further, the petitioners argue that DOSCO's claim that the wall thickness of the input coil is an actual measured thickness is contradicted by information on the record. The petitioners point to a statement made during HiSteel's sales verification that the wall thickness of both the finished HWR pipe and tube and the input coil are theoretical thicknesses that can vary within the industry tolerances established by the product specifications.<sup>34</sup> According to the petitioners, HiSteel supported this claim by providing coil specifications showing that the coils are produced to a nominal thickness that varies based on industry tolerances for specific coil widths and thicknesses.<sup>35</sup>

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Than Fair Value, 69 FR 53677 (September 2, 2004), and accompanying Issues and Decision Memorandum at Comment 16 (where the Department converted home market prices to a theoretical basis to be on the same basis as costs and U.S. sales).

<sup>32</sup> The petitioners cite Welded Steel Pipe from Korea, 57 FR at Comment 3.

<sup>33</sup> The petitioners cite DOSCO Section A Response, at A-31 and A-32, and Exhibit A-16 (where DOSCO reports selling products according to length in the home market and U.S. market, and a sales brochure that specifies the "nominal size and weight" of the products); HiSteel Section A Response, at 31; and HiSteel's November 23, 2015, Supplemental Response, at 8 (where HiSteel reports that its U.S. sales are made in metric tons and that the invoices show the "nominal" (or "theoretical" weight).

<sup>34</sup> The petitioners cite HiSteel Sales Verification Report, at 9.

<sup>35</sup> The petitioners cite HiSteel Sales Verification Report, at verification exhibit 6.

The petitioners contend that information from DOSCO's coil supplier contradicts DOSCO's assertions and shows the imprecision of steelmaking. The petitioners argue that the HiSteel verification demonstrated that a producer "may use a coil of any thickness in production that results in HWR pipe and tube within a ten percent thickness tolerance range," therefore rendering DOSCO's argument untrue.<sup>36</sup> The petitioners further cite to HiSteel's business proprietary data which contradict DOSCO's argument that the calculated "actual" thickness is always less than the nominal thickness.<sup>37</sup> Therefore, the petitioners maintain that the facts demonstrate that a pipe maker can "roll heavy" or "roll light," creating a universe of "actual" weights that could be lighter or heavier than the theoretical weights.

According to the petitioners, DOSCO's assertion that basing the preliminary antidumping duty calculations on theoretical weight led to distorted price comparisons is simply untrue. The petitioners argue that theoretical weight is based on a constant mass per unit of length and such theoretical weight constants do not vary, regardless of tolerance levels.<sup>38</sup> The petitioners note that, because calculated "actual" weights are based on the same formula used to calculate theoretical weight constants, substituting "actual" wall thickness for the nominal wall thickness, new mass/length constants are created that vary with each "actual" wall thickness.

The petitioners argue that, because HWR pipe and tube is sold on a theoretical weight basis in both markets, reporting both home market and U.S. sales on this same basis cannot result in a distortion. The petitioners point to the Department's decision in Steel Wire Rope from Japan, where the Department determined that there was no reason to select a different reporting basis when the merchandise under consideration is sold on the same basis in both markets.<sup>39</sup> Thus, the petitioners assert that, if the Department applies this same analysis here, it would reach the same conclusion. The petitioners argue that it is DOSCO's choice to use any coil with an actual thickness within a given percentage of a nominal thickness, and given that the merchandise under consideration is sold on a theoretical weight basis, the price from the customer's viewpoint is the same regardless of whether DOSCO chooses to use coil that is thicker or thinner than nominal. In any event, the petitioners question DOSCO's assertion that it considers "actual" weight when negotiating prices with its customers, considering the facts demonstrate that such information is not readily available in DOSCO America's accounting system.<sup>40</sup>

Thus, for the above reasons, the petitioners argue that the Department should continue to base the sales and cost data for the final determination for both respondents on theoretical weight.

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<sup>36</sup> The petitioners cite HiSteel Sales Verification Report, at 9.

<sup>37</sup> The petitioners point to HiSteel's home market sales database, submitted on December 21, 2015.

<sup>38</sup> The petitioners note that industry specifications typically have tables identifying the constant for common size combinations, citing to HiSteel's November 12, 2015, Supplemental Section A Response, at Appendix Tables 1.1 and 1.2 at column 3.

<sup>39</sup> The petitioners cite Steel Wire Rope from Japan: Final Results of Administrative Review of Antidumping Finding, 47 FR 3395 (January 25, 1982) (Steel Wire Rope from Japan).

<sup>40</sup> The petitioners cite DOSCO America Verification Report, at 7; and DOSCO's Section A Response, at A-32.

### Department's Position:

We continue to base the antidumping margins for DOSCO and HiSteel on theoretical weight for the final determination. In this case, neither Korean respondent weighs its products after production or prior to shipment, and thus neither is able to report the actual measured weight. Rather, DOSCO and HiSteel calculate both the theoretical and “theoretical actual” weights based on the same standard industry formula; the only difference between the weight calculations is the value that is used for the “thickness” component. Theoretical weight, referenced on the invoices, is based on the thickness of the final HWR pipe and tube product and “theoretical actual” weight uses the thickness of the input steel coil used to produce the HWR pipe and tube. Based on the reasoning set forth below, the Department finds the use of theoretical weight, as opposed to “theoretical actual” weight, to be supported by substantial evidence.

As an initial note, it is within the Department's prerogative to choose between two methods so long as it articulates a rationale that is based on substantial record evidence.<sup>41</sup> There are several bases which form the Department's rationale for electing to use theoretical weight in this investigation. In previous pipe cases, the Department based price comparisons on theoretical or actual weight, depending on the particular facts of each case.<sup>42,43</sup> Upon further consideration of the facts in this case, we find that theoretical weight is the more appropriate basis for price comparisons for several reasons. First, we are able to compare sales and costs on a consistent weight basis for DOSCO and HiSteel, as they both provided theoretical weight data for their home market and U.S. sales, and cost databases based upon those theoretical weights.<sup>44</sup> Second, U.S. customers for both DOSCO and HiSteel order products based on nominal dimensions, and are invoiced on a theoretical weight basis (not a “theoretical actual” basis).<sup>45</sup> Third, and most importantly, the product control number (CONNUM), which is used to match sales in the home and U.S. markets, is created from the nominal product dimensions as reported by the respondents in their responses to the Department's questionnaire, and theoretical weight is derived from nominal dimensions. Accordingly, there is a correspondence between the product CONNUM,

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<sup>41</sup> See Hynix Semiconductor Inc. v. United States, 391 F.Supp.2d 1337, 1342 (CIT 2005), which states: “[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.”

<sup>42</sup> For instances in which we have used theoretical weight, see e.g., Certain Welded Stainless Steel Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value, 57 FR 53693 (November 12, 1992) at Comment 3, and Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 57 Fed. Reg. 17,885 (Apr. 28, 1992); for instances in which we have used actual weights, see e.g., Welded Carbon Steel Pipe and Tube Products from Turkey: Final Results of Antidumping Administrative Review and Final Determination of No Shipments, 2013-2014, 80 FR 76674 (December 10, 2015), and Light-Walled Rectangular Pipe and Tube from Turkey: Notice of Final Results of Antidumping Administrative Review, 75 FR 61127 (October 4, 2010).

<sup>43</sup> The Department can find no precedent for the use of “theoretical actual” weight, and none of the interested parties have provided any such precedent.

<sup>44</sup> While we note that DOSCO and HiSteel also reported “theoretical actual” weight sales and cost data, and thus we could in theory use these data in our margin calculations, we find that they are not preferable for the reasons explained below.

<sup>45</sup> See DOSCO Section A Response, at A-31 and A-32, and Exhibit A-16; HiSteel Section A Response, at 31; and HiSteel's November 23, 2015, Supplemental Response, at 8.

i.e., the basis for market comparisons, and theoretical weight. This correspondence does not exist between the product CONNUM and “theoretical actual” weight.

We disagree with DOSCO that “theoretical actual” weights are preferable in this case. As noted above, DOSCO does not use these weights on its invoices to its customers in either the United States or home market. Further, we find that DOSCO’s claim that the wall thickness of the input coil is an actual measured thickness is contradicted by information on the record showing that the wall thickness of the input coil is a theoretical thickness that can vary within the industry tolerances established by the product specifications.<sup>46</sup> Because the actual thickness of input coils may differ among identical HWR pipe and tube products (i.e., CONNUMs), the use of “theoretical actual” weight creates a mismatch between the weights used to calculate per-unit prices, expenses, and costs, and the dimensions used to construct the CONNUM. In other words, relying on the “theoretical actual” weight results in the thickness of input coils being used to compute per-unit amounts for a given CONNUM which differ from the nominal wall thickness (based on the “pure” theoretical thickness) used to construct those CONNUMs. The resulting differences are attributable solely to a physical characteristic (i.e., input coil thickness) which is not one of the Department’s product characteristics comprising the CONNUM. Further, we also note that the theoretical actual method, as advocated by DOSCO, results in different thicknesses of input coil being used in the weight calculation for COP, U.S. price, and home market price for the same CONNUM. As a result, the calculated per-unit COP uses a different conversion factor from that used to compute the per-unit sales prices, for the same CONNUM. Accordingly, we disagree with DOSCO that it is less distortive to use the “theoretical actual” weights. In fact, as described above, we find that the use of “theoretical actual” weight creates distortions.

### Comment 3: Costs for Non-Prime Merchandise

The petitioners argue that DOSCO and HiSteel’s normal methodology of assigning full production costs to non-prime merchandise should be revised for the final determination. Pointing to the record, the petitioners note that DOSCO sells non-prime products at a discount without certification or warranty. Furthermore, the petitioners contend that DOSCO was unable to provide evidence supporting its statements that non-prime products are generally used for the same applications as prime pipe. Moreover, referencing Welded Line Pipe from Turkey,<sup>47</sup> the petitioners claim that the Department’s practice is to treat non-prime merchandise in the same manner as scrap, i.e., no costs are assigned and revenue from scrap sales can be used to offset costs. Therefore, for the final determination, the petitioners request that the costs assigned to non-prime products, net of offsets, be reallocated to prime products.<sup>48</sup>

HiSteel notes that section 773(f)(1) of the Act mandates that “[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles (GAAP) of the

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<sup>46</sup> See HiSteel Sales Verification Report at 9 and verification exhibit 6.

<sup>47</sup> See the petitioners’ brief at 8, where the petitioners cite Welded Line Pipe From the Republic of Turkey: Final Determination of Sales at Less Than Fair Value, 80 FR 61362 (October 13, 2015) (Welded Line Pipe from Turkey), and accompanying Issues and Decision Memorandum at 4.

<sup>48</sup> See the petitioners’ brief, at 7-8.

exporting country (or producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.” HiSteel argues that the record demonstrates that HiSteel’s normal cost-accounting methodology assigns full costs to non-prime products and that HiSteel’s accounting system complies with GAAP in Korea. Moreover, HiSteel argues that the petitioners have not presented evidence that HiSteel’s methodology does not reasonably reflect the costs associated with producing the merchandise under consideration. Accordingly, HiSteel concludes that section 773(f)(1) of the Act requires that the Department follow HiSteel’s books and records which fully cost non-prime products.

DOSCO and HiSteel argue that no factual basis exists for the reallocation of non-prime product costs to prime products, and they dispute the basis for petitioners’ argument, *i.e.*, that the Department treats all non-prime products as scrap. According to DOSCO, the Department’s actual practice is to allocate production costs to both prime and non-prime production quantities where these products can be used for the same applications. According to HiSteel, the Department explained in Welded Line Pipe from Korea<sup>49</sup> that, to the extent that the non-prime product falls within the scope, the non-prime product should be fully costed as are prime products. Therefore, HiSteel argues that, because its non-prime pipes are within the scope of the investigation, they should be fully costed as are prime products.

DOSCO points out that in the petitioners’ sole citation, Welded Line Pipe from Turkey, the Department found that the non-prime pipes could not be sold for the same applications as their prime counterparts. DOSCO argues that such is not the case here. Rather, DOSCO points out that the only non-prime pipes it sold during the POI were rusted pipes. DOSCO argues that these pipes are manufactured using the same materials and undergo the same production processes as prime products and to the best of DOSCO’s knowledge the rusted pipes are, with certain limitations, used for the same general end uses as prime products. Thus, DOSCO argues that there is no basis to treat its non-prime pipes as scrap for the final determination.

#### Department’s Position:

We agree with the respondents and did not adjust their non-prime product costs for the final determination. Contrary to the petitioners’ claim, the Department does not have a practice of treating all non-prime production as scrap, *i.e.*, valued at their sales prices. Rather, we analyze the products sold as non-prime on a case-by-case basis to determine whether the downgraded products remain in scope, and likewise can still be used in the same applications as subject merchandise.<sup>50</sup> If the product is incapable of being used for the same applications, the product’s market value is usually significantly impaired, often to a point where its full cost cannot be recovered.<sup>51</sup> Instead of attempting to judge the relative values and qualities between grades, the

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<sup>49</sup> HiSteel cites Welded Line Pipe From the Republic of Korea: Final Determination of Sales at Less Than Fair Value, 80 FR 61366 (October 13, 2015) (Welded Line Pipe from Korea), and accompanying Issues and Decision Memorandum at Comment 9.

<sup>50</sup> See Welded Line Pipe from Korea, and accompanying Issues and Decision Memorandum at Comment 9. See also Steel Concrete Reinforcing Bar from Turkey: Final Negative Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, 79 FR 54965 (September 15, 2014) (Rebar from Turkey), and accompanying Issues and Decision Memorandum at Comment 15.

<sup>51</sup> See Welded Line Pipe from Korea, and accompanying Issues and Decision Memorandum at Comment 9.

Department adopted the reasonable practice of looking at whether the downgraded product can still be used in the same general applications as its prime counterparts.<sup>52</sup>

Therefore, we reviewed the information on the record of this investigation with regard to the respondents' downgraded merchandise. During the cost verification of DOSCO, the Department found that "the only products that were designated as non-prime during the POI were rusted pipes."<sup>53</sup> Thus, the products were produced to the correct specifications, but they had rusted while in inventory. DOSCO believed that its customers used the rusted pipes in the same general applications (i.e., structural) as the pipes sold in prime condition.<sup>54</sup> Similarly, the record evidence indicates that, while HiSteel's non-prime products consist of products with minor defects such as dents or weld defects which prevent HiSteel from certifying that the product is free from deformities, HiSteel's customers may use either prime or non-prime products for any suitable application.<sup>55</sup> HiSteel and DOSCO both included their sales of non-prime merchandise in their sales databases.

Regarding the petitioners' argument that DOSCO sold its non-prime products at a discount, as would be expected for non-prime products, we find that the sales (i.e., market) prices of DOSCO's non-prime products do not reflect a significant difference from the full costs that the company assigns to them in the normal course of business.<sup>56</sup> Similarly, with respect to HiSteel, we note that the sales prices of non-prime products do not reflect a significant difference from the sales prices of prime products.<sup>57</sup> Thus, we find that the continued assignment of full costs to the prime and non-prime products produced during the POI reasonably reflects the costs associated with the production of the subject merchandise. Consequently, we did not revalue the respondents' non-prime products for the final determination.

#### Comment 4: Differential Pricing Rulemaking

In the Preliminary Determination, we found that more than 81.93 percent of DOSCO's and 69.55 percent of HiSteel's U.S. sales passed the Cohen's *d* test, which confirmed the existence of a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods. Thus, we found that the results of the Cohen's *d* test supported consideration of the application of an average-to-transaction (A-to-T) method for both respondents. Further, we determined that the average-to-average (A-to-A) method could not appropriately account for such differences because either the resulting weighted-average dumping margin moved across the de minimis threshold or the rate changed by at least 25 percent, when calculated using an alternative method based on the A-to-T method. Accordingly,

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<sup>52</sup> Id.

<sup>53</sup> See DOSCO Cost Verification Report, at 21.

<sup>54</sup> Id.

<sup>55</sup> See HiSteel's Response to the Department's Section D Supplemental Questionnaire, dated December 21, 2015, at 7.

<sup>56</sup> See DOSCO Cost Verification Report, at 21, where the Department calculated the POI average sales price received for the rusted pipes.

<sup>57</sup> See HiSteel's Cost of Production database and Home Market Sales database submitted December 21, 2015.

we preliminarily determined to use the A-to-T method to calculate the estimated weighted-average dumping margins for DOSCO and HiSteel.

DOSCO and HiSteel contend that thresholds the Department uses in its differential pricing analysis are arbitrary because they have been adopted without any justification.<sup>58,59</sup> Further, DOSCO and HiSteel claim that no mathematical justification exists for the Department's thresholds. According to DOSCO, the Department is not permitted to impose arbitrary "bright line" thresholds through its decisions in individual cases. Rather, DOSCO notes that bright-line rules must be promulgated as regulations in accordance with the Administrative Procedures Act (APA). DOSCO and HiSteel argue that, in the absence of properly promulgated regulations, the Department must explain why any application of its differential pricing analysis and the numerical thresholds used in connection with it are appropriate in the context of each specific case.<sup>60</sup> Thus, DOSCO contends that, in order for the Department to apply its differential pricing analysis here, it must: 1) explain why the various methodological choices embodied in it are appropriate; and 2) support that explanation with record evidence. Otherwise, DOSCO and HiSteel argue that the Department's analysis is inherently arbitrary and unreasonable.

Finally, DOSCO notes that the Department has stated repeatedly that its analysis of differential pricing (as well as its previous targeted dumping methodology) will be applied on a case-by-case basis.<sup>61</sup> Thus, DOSCO points out that the Department's differential pricing analysis cannot have

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<sup>58</sup> DOSCO points out that the Department's differential pricing analysis uses various thresholds including: 1) a Cohen's *d* value greater than 0.8, used as evidence of the sale's "passing" the Cohen's *d* test; 2) the 33 and 66 percent ratios of sales passing the Cohen's *d* test to all sales, used to determine which comparison methodology to apply; and 3) a 25 percent relative change in the weighted-average dumping margin between an "alternative" comparison methodology and the A-to-A methodology, used to determine if there is a meaningful difference in the results of the different methodologies. DOSCO notes that the Department first set forth its differential pricing methodology, including these thresholds, in the investigations of xanthan gum from Austria and the People's Republic of China, citing Xanthan Gum From Austria: Final Determination of Sales at Less Than Fair Value, 78 FR 33354 (June 4, 2013), and accompanying Issues and Decision Memorandum; and Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013), and accompanying Issues and Decision Memorandum at Comment 3. According to DOSCO and HiSteel, the Department has never explained why the thresholds used in the ratio test are 33 and 66 percent.

<sup>59</sup> HiSteel notes that the Department responded to its argument that there was no explanation for the 33 and 66 percent thresholds in Welded Line Pipe from Korea. However, HiSteel contends that the Department's reasoning in that case was circular, because it stated that the thresholds are reasonable because it has concluded that they are so, without explaining how it reached that conclusion. HiSteel cites Welded Line Pipe from Korea, and accompanying Issues and Decision Memorandum at Comment 1.

<sup>60</sup> For example, DOSCO argues that this principle has been recognized by the courts in cases addressing the de minimis standard applied in investigations, as both the CIT and the U.S. Court of Appeals for the Federal Circuit (CAFC) held that because the de minimis standard had not at that time been promulgated as a regulation in accordance with the APA, the Department was not permitted to apply it automatically in each case. DOSCO cites Carlisle Tire v. United States, 634 F. Supp. 419, 423 (CIT 1986) (Carlisle Tire); and Washington Red Raspberry Commn. v. United States, 859 F. 2d 898, 903 (CAFC 1988) (Washington Raspberry).

<sup>61</sup> DOSCO cites Preliminary Determination, and accompanying Preliminary Decision Memorandum at 5; Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930, 74931 (December 10, 2008); and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101, 8104 (February 14, 2012) (Final Modification for Reviews).



the status of binding law. As a result, DOSCO claims that the Department cannot use the A-to-T method in the final determination.

The petitioners disagree that the Department is not permitted to rely on the thresholds set forth in its differential pricing analysis unless it engages in rulemaking that satisfies the requirements of the APA, pointing out that the CIT recently rejected this same argument in Apex.<sup>62</sup> Further, the petitioners disagree with DOSCO and HiSteel that the Department has never explained why the thresholds used in the “ratio test” are 33 and 66 percent. The petitioners point out that in OCTG from India, the Department provided a comprehensive explanation of these thresholds.<sup>63</sup> Therefore, the petitioners state that the Department should continue to rely on these thresholds in its differential pricing analysis for the final determination.

#### Department’s Position:

We disagree with the respondents. The notice and comment requirements of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”<sup>64</sup> Further, as we noted previously, we normally make these types of changes in practice (e.g., the change from the targeted dumping analysis to the current differential pricing analysis) in the context of our proceedings, on a case-by-case basis.<sup>65</sup> As the CAFC has recognized, the Department is entitled to make changes and adopt a new approach in the context of its proceedings, provided it explains the basis for the change, and the change is a reasonable interpretation of the statute.<sup>66</sup> Moreover, the CIT in Apex recently held that the Department’s change in practice (from targeted dumping to its differential pricing analysis) was exempt from the APA’s rule making requirements, stating:

Commerce explained that it continues to develop its approach with respect to the use of A-T “as it gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the {A-A} comparison method.” Final I&D Memo at 18 (internal quotations omitted). Commerce additionally explained that the new approach is “a more precise characterization of the purpose and application of {19 U.S.C. § 1677f-1(d)(1)(B)}” and is the product of Commerce’s “experience over the last several years, . . . further research, analysis and consideration of the numerous comments and suggestions on what guidelines,

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<sup>62</sup> The petitioners cite Apex Frozen Foods Private Ltd. v. United States, 2016 CIT LEXIS 9 (CIT 2016), \*30-73 (Apex).

<sup>63</sup> The petitioners cite Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances: Certain Oil Country Tubular Goods From India, 79 FR 41981 (July 18, 2014) (OCTG from India), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>64</sup> See 5 U.S.C. § 553(b)(3)(A).

<sup>65</sup> See Differential Pricing Analysis; Request for Comments, 79 FR 26720, 26722 (May 9, 2014) (Differential Pricing Comment Request).

<sup>66</sup> See Saha Thai Steel Pipe Company v. United States, 635 F.3d 1335, 1341 (CAFC 2011); and Washington Raspberry, 859 F. 2d at 902-03. See also Carlisle Tire, 634 F. Supp. at 423 (discussing exceptions to the notice and comment requirements of the APA).

thresholds, and tests should be used in determining whether to apply an alternative comparison method based on the {A-T} method.” Request for Comments, 79 Fed. Reg. at 26,722. Commerce developed its approach over time, while gaining experience and obtaining input. Under the standard described above, Commerce’s explanation is sufficient. Therefore, Commerce’s adoption of the differential pricing analysis was not arbitrary.<sup>67</sup>

Moreover, as we noted previously, as the Department “gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the average-to-average comparison method, the Department expects to continue to develop its approach with respect to the use of an alternative comparison method.”<sup>68</sup> Further developments and changes, along with further refinements, are expected in the context of our proceedings based upon an examination of the facts and the parties’ comments in each case.

Finally, we disagree with DOSCO’s and HiSteel’s contention that the Department has never explained the 33 and 66 percent thresholds used in the ratio test. Specifically, in OCTG from India, we addressed the establishment of the 33 and 66 percent thresholds as follows:

In the differential pricing analysis, the Department reasonably established a 33 percent threshold to establish whether there exists a pattern of prices that differ significantly. The Department finds that when a third or less of a respondent’s U.S. sales are not at prices that differ significantly, then these significantly different prices are not extensive enough to satisfy the first requirement of the statute...

Likewise, the Department finds reasonable, given its growing experience of applying section 777A(d)(1)(B) of the Act and the application of the A-to-T method as an alternative to the A-to-A method, that when two thirds or more of a respondent’s sales are at prices that differ significantly, then the extent of these sales is so pervasive that it would not permit the Department to separate the effect of the sales where prices differ significantly from those where prices do not differ significantly. Accordingly, the Department considered whether, as an appropriate alternative comparison method, the A-to-T method should be applied to all U.S. sales. Finally, when the Department finds that between one third and two thirds of U.S. sales are at prices that differ significantly, then there exists a pattern of prices that differ significantly, and that the effect of this pattern can reasonably be separated from the sales whose prices do not differ significantly. Accordingly, in this situation, the Department finds that it is appropriate to address the concern of masked dumping by considering the application of the A-to-T method as an alternative to the A-to-A method for only those sales which constitute the pattern of prices that differ significantly.<sup>69</sup>

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<sup>67</sup> See Apex, 2016 CIT LEXIS 9, \*17, 22.

<sup>68</sup> See Differential Pricing Analysis; Request for Comments, 79 FR 26720, 26722 (May 9, 2014).

<sup>69</sup> See OCTG from India, and accompanying Issues and Decision Memorandum at Comment 1.

Thus, we find that these thresholds are reasonable and consistent with the requirements of section 777A(d)(1)(B) of the Act.<sup>70,71</sup> Accordingly, the Department's development of the differential pricing analysis and the application of this analysis in this case, including the thresholds established therein, are consistent with established law.

Comment 5: Differential Pricing Analysis

HiSteel argues that the Department's differential pricing analysis is inherently flawed because the Cohen's *d* test yields results which are not statistically valid and results in "false positives." . HiSteel notes that economic research suggests that market price trends for commodity indices are indistinguishable from a "random walk," in which the price moves from day to day by a random amount, and it provided information testing the reliability of the Department's differential pricing analysis by applying it to data that are assumed to follow such trends.<sup>72</sup> According to HiSteel, its analysis shows that the odds of a positive Cohen's *d* test result for any quarterly time period is around 55 percent, while the odds of having at least one quarterly period each year with a positive Cohen's *d* test result are more than 90 percent.<sup>73</sup> HiSteel argues that, given these circumstances, a finding that more than 33 percent of an exporter's sales pass the Cohen's *d* test provides no indication that such price differences represent a pattern within the meaning of the Act because purely "random" data would be expected to pass this threshold in virtually every case.

According to HiSteel, it has attempted to explain the mathematical flaws in the Department's differential pricing analysis, especially the use of Dr. Cohen's thresholds to determine whether the Cohen's *d* effect size is "large."<sup>74</sup> HiSteel claims that the Department has dismissed these arguments in prior cases, stating that the statistical principles on which HiSteel relies are only relevant when analyzing samples of a population, rather than information for the population as a whole.<sup>75</sup> Nonetheless, HiSteel argues here that the meaning of a mathematical test like Cohen's *d* depends on the nature of the data from which it is calculated regardless of whether that data are a sample or represent the entire population. Thus, HiSteel continues to insist that there are a number of aspects of the Department's Cohen's *d* test which make it unreliable.

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<sup>70</sup> Nonetheless, these thresholds, as with the approach incorporated in the differential pricing analysis itself, may be modified given factual information and argument on the record of a proceeding. See, e.g., Preliminary Determination, and accompanying Preliminary Decision Memorandum at 6.

<sup>71</sup> For further discussion on the reasonableness of the Cohen's *d* thresholds and the meaningful difference test, see Comment 5, below.

<sup>72</sup> HiSteel cites Letter from HiSteel entitled "Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Korea - Information Relating to 'Differential Pricing Analysis,'" dated January 15, 2016 (HiSteel Differential Pricing Submission) at Attachment 2.

<sup>73</sup> HiSteel cites HiSteel Differential Pricing Submission at Attachment 2.

<sup>74</sup> Id.

<sup>75</sup> HiSteel cites Welded Line Pipe from Korea, at Comment 1. According to HiSteel, the Department is mistaken and the Cohen's *d* calculations do not depend on the data representing only samples from a larger dataset, rather than the entire population. Instead, HiSteel asserts that if the data are normally distributed, the Cohen's *d* calculations are meaningful.

As an initial matter, HiSteel claims that the Department's use of the Cohen's *d* test, as well as the thresholds for determining small, medium, and large differences through the Cohen's *d* effect size, assumes that the distribution of U.S. prices follows a normal distribution. According to HiSteel, the Cohen's *d* effect size was developed to compare two datasets with normal distributions, roughly equal variance, and roughly equal numbers. HiSteel argues that, once these assumptions are relaxed, the extent of the overlap between two datasets is impossible to determine without additional information beyond the value of the Cohen's *d* effect size.<sup>76</sup> Thus, HiSteel states that data that are not normally distributed do not have the characteristics that permit the use of the Cohen's *d* effect size.<sup>77</sup> However, HiSteel provides an analysis of its reported U.S. sales data using SAS to determine whether the data are normally distributed which it claims shows that they are not.<sup>78</sup> As a result, HiSteel claims that under these circumstances the results of the Cohen's *d* test are both meaningless and invalid.<sup>79</sup>

Further, HiSteel notes that Dr. Jacob Cohen, who developed the Cohen's *d* test, cautioned that the numerical thresholds used to determine whether the Cohen's *d* coefficient is small, medium, or large are arbitrary.<sup>80</sup> HiSteel points out that Dr. Cohen proposed these thresholds as a convention and he recognized the risk of their being misunderstood; as a result, he invited parties "not to employ them if possible."<sup>81</sup> Moreover, according to HiSteel, Dr. Cohen noted that "{t}he terms 'small,' 'medium,' and 'large' are relative, not only to each other" but also to the specific content and research method being employed.<sup>82</sup> Thus, HiSteel argues that it is not surprising that the usefulness of the small, medium, and large classifications of the Cohen's *d* effect size has been controversial.<sup>83</sup> Therefore, at a minimum, HiSteel argues that the Cohen's *d* thresholds must be employed with sensitivity regarding their context, considerations which the Department's differential pricing analysis ignores. Consequently, HiSteel contends that the Department's differential pricing analysis is not consistent with recognized statistical principles because it applies the Cohen's *d* test in an improper manner.

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<sup>76</sup> HiSteel provides examples in its brief which graphically depict the extent of the overlap between two populations with: 1) normal distributions and different Cohen's *d* effect sizes; and 2) non-normal distributions and different Cohen's *d* effect sizes. HiSteel cites HiSteel's case brief, at 10-18. According to HiSteel, these graphs demonstrate that the concept of overlap as measured by the Cohen's *d* test becomes meaningless when applied to data without a normal distribution.

<sup>77</sup> As support for this assertion, HiSteel cites HiSteel Differential Pricing Submission, at Attachment 2.

<sup>78</sup> *Id.*, at Attachment 4. According to HiSteel, its data show significant skewness (which is the extent to which the data depart from the symmetry of a normal distribution) and kurtosis (which is whether the data are distributed steeper or flatter than a normal distribution would be). *Id.* In addition, HiSteel claims that the usual tests used to determine normal distribution indicate that it is very unlikely that any CONNUM-specific sales data will be normally distributed. *Id.*

<sup>79</sup> *Id.*, at Attachment 2.

<sup>80</sup> *Id.*, at Attachment 1.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See HiSteel's case brief, at 23 (citing The Essential Guide to Effect Sizes: Statistical Power, Meta-Analysis, and the Interpretation of Research Results, P. Ellis (2010), at 41-42 (citations omitted)).

DOSCO argues that the Department should abandon its differential pricing analysis in the final determination because it is illegal, unreasonable, and unsupportable. DOSCO and HiSteel point out that a World Trade Organization (WTO) dispute settlement panel recently held that the Department's differential pricing methodology is inconsistent with the WTO Antidumping Agreement and its use of zeroing as part of this methodology is an "as such" violation of Articles 2.4 and 2.4.2.<sup>84</sup> Moreover, DOSCO and HiSteel note that the WTO Appellate Body has consistently found that the Department's use of zeroing violates the United States' obligations under the Antidumping Agreement.<sup>85</sup> Thus, DOSCO contends that, while the Department historically awaits the Appellate Body's ruling before making any modification to the existing law or its practice, it should suspend its use of differential pricing now given the Appellate Body's track record of ruling against the United States in matters involving zeroing.<sup>86</sup> According to DOSCO, this approach would allow the Department to avoid unnecessary "copycat" disputes that are otherwise certain to follow in the future.

In any event, DOSCO and HiSteel argue that the statutory prerequisites for using an alternative comparison methodology are not present in this case. Specifically, DOSCO and HiSteel claim that no reasonable basis exists for the Department to find a pattern of prices that differ significantly by purchaser, region, or time period, as required by section 777A(d)(1)(B)(i) of the Act.<sup>87</sup> Additionally, according to DOSCO and HiSteel, the mere existence of different results using different comparison methodologies is insufficient to satisfy the requirements of section 777A(d)(1)(B)(ii) of the Act. HiSteel argues that, even if a pattern of prices that differ significantly exists, the Department's differential pricing analysis does not explain why such differences cannot be taken into account using either the A-to-A or transaction-to-transaction (T-to-T) methods. DOSCO and HiSteel contend that the different results observed in the Preliminary Determination were principally the result of not permitting offsets for non-dumped comparisons (i.e., zeroing), rather than differential pricing.<sup>88,89</sup> Thus, DOSCO and HiSteel

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<sup>84</sup> HiSteel cites United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea, WT/DS464/R (March 11, 2016) (U.S. – Washers), at 122-123.

<sup>85</sup> HiSteel cites, e.g., United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (February 4, 2009); United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (April 30, 2008); United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (January 9, 2007); and United States – Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R (April 18, 2006).

<sup>86</sup> Alternatively, DOSCO argues that, at a minimum, the Department should suspend its practice of zeroing negative dumping margins when basing its comparisons on the A-to-T method. HiSteel contends that, if the Department determines to apply the A-to-T method in the final determination, it should limit its use to transactions which are differentially priced and it should not employ zeroing.

<sup>87</sup> HiSteel dismisses the CIT's recent ruling in Apex as circular. In that case, the CIT held that, where the Department finds differences between a de minimis margin calculated using the A-to-A method, and a non-de minimis margin calculated using the A-to-T method, it is reasonable to presume that the A-to-A method cannot account for the pattern of significant price differences because the A-to-A method cannot uncover masked dumping. See Apex, Slip Op. 16-9. According to HiSteel, the Department's decision to employ the A-to-T method does not require any showing that the targeted sales were also dumped (and thus allegedly "masked" by the A-to-A method). HiSteel claims that, in the absence of such a requirement, there is no basis to conclude that the A-to-A method "masked" anything.

<sup>88</sup> DOSCO notes that the Department's application of the A-to-T method to non-targeted sales also contributes to this difference.

argue that the Department's differential pricing analysis does not comply with the requirements of the statute and, as a result, the Department is required to calculate their weighted-average dumping margins using the A-to-A method in the final determination.

The petitioners assert that DOSCO's and HiSteel's objections to the Department's differential pricing analysis are without merit. According to the petitioners, not only has the Department considered and rejected similar arguments in the past, but the CIT earlier this year issued rulings in Apex and Tri Union affirming the Department's differential pricing analysis against a wide range of claims, including those raised in this investigation.<sup>90</sup>

Specifically, the petitioners take issue with HiSteel's challenges to the Cohen's *d* test, pointing out that the CIT in Tri Union upheld as reasonable the Department's use of this test to identify significant price differences.<sup>91</sup> Moreover, the petitioners disagree with HiSteel's contention that the Department did not explain why price differences cannot be taken into account by the A-to-A method. The petitioners assert that in Apex the CIT rejected this exact challenge.<sup>92</sup>

Finally, the petitioners disagree with DOSCO's suggestion that the Department should immediately implement the WTO panel's ruling, noting that it is not the Department's practice to do so. According to the petitioners, whether the panel ruling is ultimately adopted by the WTO, and the Department implements it in the future has no bearing on the conduct of this investigation. In any event, the petitioners assert that the courts have held that the Department is not automatically bound by the determinations of the WTO Dispute Settlement Body.<sup>93</sup>

#### Department's Position:

As an initial matter, we note that there is nothing in section 777A(d) of the Act that mandates how the Department measures whether there is a pattern of prices that differ significantly or explains why the A-to-A method or the T-to-T method cannot account for such differences. On the contrary, carrying out the purpose of the statute here is a gap filling exercise properly conducted by the Department.<sup>94</sup> As explained in the Preliminary Determination, as well as in

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<sup>89</sup> Further, DOSCO claims the Department has never attempted to define what the term "pattern" means or how it determines that any observed price differences are actually attributable to differential pricing, rather than simply the result of random price fluctuations.

<sup>90</sup> The petitioners cite Apex, 2016 CIT LEXIS 9, \*30-73; and Tri Union Frozen Products, Inc. v. United States, 2016 CIT LEXIS 37 (CIT 2016), \*111-141 (Tri Union).

<sup>91</sup> The petitioners cite Tri Union, 2016 CIT LEXIS 37, \*113-14.

<sup>92</sup> The petitioners cite Apex, 2016 CIT LEXIS 9, \*59-63.

<sup>93</sup> The petitioners cite Slater Steel Corp v. United States, 27 CIT 1775, 1782 (2006).

<sup>94</sup> See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (Chevron) (recognizing deference where a statute is ambiguous and an agency's interpretation is reasonable); see also Apex, 37 F. Supp. 3d at 1302 (applying Chevron deference in the context of the Department's interpretation of section 777A(d)(1) of the Act).

various other proceedings,<sup>95</sup> the Department's differential pricing analysis, including the use of the Cohen's *d* test as a component in this analysis, is reasonable and is in accordance with law.

With Congress' enactment of the Uruguay Round Agreements Act (URAA), section 777A(d) of the Act states:

(d) Determination of Less Than Fair Value.--

(1) Investigations.--

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

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

(B) Exception. The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if--

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

(2) Reviews.--In a review under section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

The Statement of Administrative Action (SAA) expressly recognizes that:

New section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for

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<sup>95</sup> See, e.g., Welded Line Pipe from Korea, at Comment 1; CWP from Korea, at Comments 1 and 2, and Large Residential Washers From the Republic of Korea: Final Results of the Antidumping Duty Administrative Review: 2012-2014, 80 FR 55595 (September 16, 2015) (LRW from Korea), and accompanying Issues and Decision Memorandum at Comment 5.

a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring.<sup>96</sup>

The SAA further discusses this new section of the statute and the Department's change in practice to using the A-to-A method:

In part the reluctance to use the average-to-average methodology had been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."<sup>97</sup>

With the enactment of the URAA, the Department's standard comparison method in an LTFV investigation is normally the A-to-A method. This is reiterated in the Department's regulations, which state that "the Secretary will use the A-A method unless the Secretary determines another method is appropriate in a particular case."<sup>98</sup> As recognized in the SAA, the application by the Department of the A-to-A method to calculate a company's weighted-average dumping margin has raised concerns that masked or hidden dumping may not be unmasked by this comparison method. Additionally, the SAA states that consideration of the A-to-T method as an alternative comparison method responds to such concerns, *i.e.*, "where targeted dumping *may* be occurring" (emphasis added).<sup>99</sup> Neither the statute nor the SAA states that there must be masked or targeted dumping in order for the Department to use the A-to-T method; rather, the use of the A-T method may be appropriate in instances involving masked or targeted dumping. As stated in the statute, the requirements for considering whether to apply the A-to-T method are that there exists a pattern of prices that differ significantly and that the Department explains why neither the A-to-A method nor the T-to-T method can account for such differences.

Accordingly, the Department finds that the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method is the appropriate tool to measure whether, and if so to what extent, a given respondent is dumping the subject merchandise at issue in the U.S. market.<sup>100</sup> While "targeting" and "targeted dumping" may be used as a general expression to denote this provision of the statute,<sup>101</sup> these terms impose no additional requirements beyond those specified

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<sup>96</sup> See SAA, at 843.

<sup>97</sup> See SAA, at 842.

<sup>98</sup> See 19 CFR 351.414(c)(1). This approach is also now followed by the Department in administrative and new shipper reviews. See Final Modification for Reviews, 77 FR 8101 (where the Department explained that it would now "calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average ('A-A') comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations").

<sup>99</sup> See SAA, at 843 (emphasis added).

<sup>100</sup> See 19 CFR 351.414(c)(1).

<sup>101</sup> See *e.g.*, Samsung v. United States, Slip Op. 15-58, p. 5 ("Commerce may apply the A-to-T methodology 'if (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time, and (ii) the administering authority explains why such differences cannot be taken into account using' the A-to-A or T-to-T methodologies. *Id.* § 1677f-1(d)(1)(B). Pricing that meets both conditions is known as 'targeted dumping.'").



in the statute for the Department to otherwise determine that the A-to-A method is not appropriate based upon a finding that the two statutory requirements have been satisfied. Furthermore, “targeting” implies a purpose or intent on behalf of the exporter to focus on a subgroup of its U.S. sales. The court has already found that the purpose or intent behind an exporter’s pricing behavior in the U.S. market is not relevant to the Department’s analysis of the statutory provisions of section 777A(d)(1)(B) of the Act.<sup>102</sup> The CAFC has stated:

Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. As a result, Commerce looks to its practices in antidumping duty investigations for guidance. Here, the CIT did not err in finding there is no intent requirement in the statute, and we agree with the CIT that requiring Commerce to determine the intent of a targeted dumping respondent “would create a tremendous burden on Commerce that is not required or suggested by the statute.”<sup>103</sup>

As stated in section 777A(d)(1)(B) of the Act, the requirements for considering whether to apply the A-to-T method are that there exists a pattern of prices that differ significantly and that the Department explains why the A-to-A method or the T-to-T method cannot account for such differences. The Department’s application of a differential pricing analysis in this investigation provides a complete and reasonable interpretation of the language of the statute, regulations, and SAA to identify when a pattern of prices that differ significantly among purchasers, regions, or time periods cannot be appropriately taken into account using the A-to-A method.

As described in the Preliminary Determination, the differential pricing analysis addresses the statutory requirements of section 777A(d)(1)(B). The first requirement, the “pattern requirement,” is addressed using the Cohen’s *d* test and the ratio test. The pattern requirement will establish whether conditions exist in the pricing behavior of the respondent in the U.S. market where dumping may be masked or hidden, *i.e.*, where higher-priced U.S. sales offset lower-priced U.S. sales. Consistent with the pattern requirement, the Cohen’s *d* test, for comparable merchandise, compares the mean price to a given purchaser, region, or time period to the mean price to all other purchasers, regions, or time periods to determine whether this difference is significant. The ratio test then evaluates the results of these individual comparisons from the Cohen’s *d* test to determine whether the extent of the identified differences in prices which are found to be significant is sufficient to find a pattern and satisfy the pattern requirement, *i.e.*, that conditions exist which may result in masked dumping.

When the respondent’s pricing behavior exhibits conditions in which masked dumping may be a problem – *i.e.*, where there exists a pattern of prices that differ significantly – then the Department considers whether the standard A-to-A method can account for “such differences” – *i.e.*, the pattern or conditions found pursuant to the pattern requirement. To examine this second

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<sup>102</sup> See JBF RAK LLC v. United States, 991 F. Supp. 2d 1343, 1355 (CIT 2014); aff’d JBF RAK LLC v. United States, 790 F.3d 1358 (CAFC 2015) (JBF RAK).

<sup>103</sup> See JBF RAK, 790 F.3d at 1368 (internal citations omitted).

statutory requirement, the “explanation requirement,” the Department considers whether there is a meaningful difference between the weighted-average dumping margin calculated using the A-to-A method and that calculated using the appropriate alternative comparison method based on the A-to-T method. Comparison of these results summarize whether the differences in U.S. prices may mask or hide dumping when NVs are compared with average U.S. prices (the A-to-A method) as opposed to when NVs are compared with sale-specific U.S. prices (the A-to-T method). When there is a meaningful difference in these results, the Department finds that the extent of masked dumping is meaningful to warrant the use of an alternative comparison method to quantify the amount of a respondent’s dumping in the U.S. market, thus fulfilling the language and purpose of the statute and the SAA.

1. The Department’s Cohen’s *d* test produces “false positives” as it finds “patterns” in purely random data, and thus does not satisfy section 777A(d)(1)(B)(i) of the Act.

The Department disagrees with HiSteel’s assertions, as they are not only unsupported by the record but also illogical. As an initial matter, a respondent’s pricing behavior cannot reasonably be considered to be “random.” Any rational enterprise has established corporate priorities and goals which are reasonably determinative of its pricing behavior. In a market economy, such as Korea, one primary set of goals is to maximize revenue and minimize costs in order to generate the greatest return for the owners of the enterprise. To consider that any such company’s pricing behavior, including HiSteel’s, would result in random prices is nonsensical. Nonetheless, HiSteel continues down this illogical path:

For example, a 2010 paper from the National Bureau of Economic Research concluded that “across commodity indices we cannot generate forecasts that are, on average, structurally more accurate and robust than those based on a random walk or autoregressive specifications.” See, e.g., J. Groen and P. Pesenti, “Commodity Prices, Commodity Currencies, and Global Economic Developments,” NBER Working Paper 157 (Feb. 2010) at 3 (provided in HiSteel’s January 15, 2016 Submission as Attachment 2 to Attachment 2 of that submission).<sup>104</sup>

The fact that commodity indices, according to the cited paper, may follow a “random walk or autoregressive specification” is inapposite with respect to HiSteel’s pricing behavior in the U.S. market. A commodity index (for which there is no evidence on the record that any such index exists for the subject merchandise) is based on a multitude of transactions between many buyers and sellers. HiSteel’s commercial experience is not reflected by a commodity index. Specifically, HiSteel’s U.S. sales data represent the sales prices between a single seller and individual buyers, and thus are not analogous to a commodity index. To the contrary, if such an index for the subject merchandise exists, HiSteel’s sales would be, collectively, a component of these data for such an index along with all of the other sellers and buyers of subject merchandise.

HiSteel’s sale prices and pricing behavior, in and of themselves, however, do not constitute such a market index. Instead, market prices and conditions are merely one factor which would influence HiSteel’s pricing behavior, along with other factors, such as customer relationships, the

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<sup>104</sup> See HiSteel’s Case Brief at 4, footnote 5.

terms of sale, and the goal of maximizing profit. It is a combination of all of these factors which influence HiSteel's pricing decisions in the U.S. market. It is illogical, if not nonsensical, to imagine that HiSteel's price to a given customer on a given day is some random difference (or "walk") from the price at which HiSteel sold the same merchandise to a different customer on a preceding day.

HiSteel is challenging the Department's use of its differential pricing method to determine if there is "a pattern of export prices" for "comparable merchandise that differ significantly among purchasers, regions or periods of time," pursuant to section 777A(d)(1)(B)(i) of the Act. This method is part of a more comprehensive analysis under the Act in which the Department is tasked with evaluating whether HiSteel has dumped subject merchandise in the U.S. market, and the very reason the Department uses the differential pricing method is to determine if the use of comparisons is appropriate given HiSteel's pricing data (and decisions as reflected through those data) on the record. The Department's use of the differential pricing method is therefore reasonable because, despite HiSteel's arguments to the contrary, even when no pattern is found to exist, its commercial behavior is still not "random," but the result of many economic and business factors.

## 2. The Conceptual Flaws in the "Differential Pricing Analysis" Render It Meaningless

On pages 5 to 21 of its case brief, HiSteel alleges one overarching flaw in the agency's differential pricing analysis: the Department has not addressed the assumptions of a normal distribution of the sampled data with equal variances and sample sizes. Furthermore, HiSteel rejects the Department's response to these same issues made by HiSteel in earlier proceedings.<sup>105</sup> The Department continues to disagree with HiSteel in this final determination on this claim.

As an initial matter, HiSteel posits that its U.S. sales data submitted for this LTFV investigation do not constitute a population of data, but rather are "only a portion of the total universe of U.S. sales made by a respondent,"<sup>106</sup> either encompassing a broader time period or including both subject and non-subject merchandise. Such claims are meritless. The purpose of this investigation is to analyze the pricing behavior of HiSteel during the specified time period and to calculate its estimated weighted-average dumping margin. The Department's analysis is based on HiSteel's U.S. sales of subject merchandise during this period of investigation, and the description of the merchandise at issue and the period of investigation itself are both specifically defined. Accordingly, the set of U.S. sales under analysis are both unique and complete by definition – *i.e.*, a population. In conducting its analysis, the Department must determine whether the method is appropriate to calculate HiSteel's estimated weighted-average dumping margin,<sup>107</sup> and, as described in the Preliminary Decision Memorandum, the Department has followed the statutory provisions for a less-than-fair-value investigation<sup>108</sup> to this end. Thus,

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<sup>105</sup> See HiSteel's Case Brief at 5, citing to Welded Line Pipe from Korea and the accompanying Issues and Decision Memorandum at Comment 1.

<sup>106</sup> See HiSteel's Case Brief at 8, including footnote 11.

<sup>107</sup> See 19 CFR 351.414(c)(1).

<sup>108</sup> See Preliminary Determination, Preliminary Decision Memorandum at 4-5 ("In LTFV investigations, the Department examines whether to compare weighted-average NVs with the EPs (or CEPs) of individual sales (*i.e.*,

consistent with the statute and the Department's regulations, the Department has conducted its analysis, including the calculation of HiSteel's estimated weighted-average dumping margin and a differential pricing analysis, to determine whether the average-to-average method is appropriate to calculate the margin, using the entire population of HiSteel's U.S. sales of subject merchandise during the POI. Accordingly, HiSteel's claims in this regard are without merit.

As additional support for its argument that normality is a prerequisite for the Department's analysis, HiSteel conflates Dr. Cohen's concepts of "effect size" with "power analysis."<sup>109</sup> This argument also fails. In a power analysis, the required statistical significance, effect size and sample size are inputs for determining the robustness of a given analysis. Effect size is only one of the determinant factors when designing a research project for a desired power, where the other two factors are related to the sampling technique used in the project. As discussed above, the Department's differential pricing analysis in this investigation examines all U.S. sale prices and thus sampling is not relevant. Although the distribution of the sampled data is certainly an intrinsic factor in a power analysis, such an analysis is not at issue here.

Likewise, HiSteel's reference to the Department's M&M example is misplaced.<sup>110</sup> The Department's M&M example was set forth in Welded Line Pipe from Korea for the purpose of explaining why SeAH's (i.e., the respondent's) claim requiring normality in that investigation was incorrect, and to explain "the distinctions between statistical analysis, random sampling, and statistical significance and the role of a normal distribution in each of these."<sup>111</sup>

The Department disagrees with SeAH's contention that the Department must verify that a normal distribution exists in order for the Department's Cohen's *d* analysis to be valid. SeAH appears to misunderstand the distinctions between statistical analysis, random sampling, and statistical significance and the role of a normal distribution in each of these.

A "statistical analysis" is another name for data analysis – what the Department does in every proceeding to calculate a weighted-average dumping margin or a cost of production. In this context, "data" and "statistical" can be considered synonymous, just as data and statistics can be as well (e.g., import statistics are simply data points which quantify the imports of a given country). As an example, a one-pound bag of M&Ms will have candy with blue, green, yellow, red and brown coatings. To count up the number of each color in this individual one-pound bag and to calculate the percentages of each color relative to the total number of candies in the bag is a statistical analysis. Likewise, a "statistical measure" is merely a value which quantifies some aspect in a statistical

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the average-to-transaction method) as an alternative comparison method using an analysis consistent with section 777A(d)(1)(B) of the Act.").

<sup>109</sup> See HiSteel's Case Brief at 8, footnote 11. The quoted text provided by HiSteel is not at page 27 of Cohen's text, however, Cohen's discussion of "power analysis" does begin at page 27 (See HiSteel's January 15, 2016, submission, at Attachment 1).

<sup>110</sup> See HiSteel's Case Brief at 6.

<sup>111</sup> See Welded Line Pipe from Korea and the accompanying Issues and Decision Memorandum at Comment 1, pages 21-22.

analysis. The number (*i.e.*, frequency) and proportion of each color of candy in the one-pound bag of M&Ms are each statistical measures.

In this example, if there exists only a single, one-pound bag of M&Ms, then the range of the color of candies in that bag would reflect the colors of these candies for the entire universe of M&Ms. However, if this one-pound bag is only one of ten thousand bags filled at a given plant on October 5, 2015, then one may consider the number and proportion of the color of candies in this bag to be a sample of the production at that plant on that day. If there was no inherent bias in how these bags of M&Ms were filled on October 5th at the M&M factory, then the sample represented in the one-pound bag under examination may be considered a “random sample.” If this is so, then any one of the other 9,999 bags of M&Ms filled on October 5th could also be considered as a random sample of the number of each color of candy produced on that fifth day in October.

Lastly, “statistical significance” quantifies the randomness, or sampling error, or “noise” that is inherent in any sample from a population universe. In this example, at the M&M factory, the number of candies of each color is distributed equally, such that each color has 20 percent of the total number of candies made that day. In the one-pound bag which has 500 candies and for which we counted the number of each color, there are 102, 94, 99, 104 and 100 blue, green, yellow, red and brown candies, respectively. Each of these five values is an estimate of the number of each color of candy produced on that day. The difference between these numbers (*i.e.*, estimated values) and the actual number of each color produced (*i.e.*, 100 for each color for a 500-count bag) reflects the randomness of the sample or its sampling error. If the number of each color of candy were calculated for another, and another, one-pound bag of M&Ms, then these numbers may, or mostly likely will, be different from the first bag and also from the actual numbers from the factory as a whole.

The statistical significance of the number of each color of candies in a single one-pound bag measures how accurate and confident one is of this estimation to represent the actual distribution of the colors of different candies for the factory as a whole. A typical way to express this would be that with 95 percent confidence that the number of each color of candy in a one-pound bag is between 95 and 105. This estimate, with the associated statistical significance or statistical inference, has the principle assumption of a normal distribution of the underlying randomness of the sample. A normal distribution is a primary characteristic of a random sample.

Nonetheless, in the Department’s analysis of SeAH’s U.S. price data, it has all of the prices of SeAH’s sales in the U.S. market during the POI. When the Department calculates a Cohen’s *d* coefficient, preceded by its constituent means and standard deviations of the test and comparison groups, these values include the complete population universe of SeAH’s U.S. price data. This is equivalent to having all of the data from the M&M factory for that day’s production of ten thousand one-pound bags of M&Ms. The Department is not limited, as implied by SeAH’s arguments, to only knowing the number of each color of candy in a single one-pound bag.

SeAH's liberal scattering of terms and concepts like t-test, power analysis, samples, "randomly and independently drawn from normal populations," sample size and "normal distribution" all reflect SeAH's attempt to obfuscate the issue. Such diversions are not relevant to the Department's analysis as explained above, and SeAH's claims are meritless.<sup>112</sup>

The Department's explanation on this point was issued in response to the respondent's argument in Welded Line Pipe from Korea, as here, that the data upon which the Department's analysis is based must exhibit a normal distribution under the presumption that these data represent a data sample and not a complete population. As discussed above, HiSteel's U.S. sales data represent all of its relevant sales during the POI – *i.e.*, not a data sample from a broader universe of sales. However, as reflected in HiSteel's case brief, HiSteel misunderstands the Department's explanation in Welded Line Pipe from Korea, and incorrectly claims that the Department believes that "statistical principles used to predict the color of an M&M picked at random from a bag (to use the Department's example) have no bearing when all of the M&Ms are in front of you."<sup>113</sup>

HiSteel's claim in this regard is confusing and incorrect. The use of a probability analysis – guessing the color of an M&M picked at random – is not the Department's analysis when it uses a differential pricing analysis. By definition, an M&M picked at random is a sample of "all of the M&Ms {that} are in front of you," where the statistical parameters used to make such a prediction are based on the distribution of colors in the population of M&Ms "in front of you." Predicting what HiSteel's pricing behavior will be in a given instance, however, is not the purpose of the Department's analysis when it uses a differential pricing analysis. The Cohen's *d* test evaluates the significance of the differences in prices for comparable merchandise among purchasers, regions or time periods. For those sales which are found to have prices which differ significantly, the ratio test then measures the extent of these sales, by value, throughout all of the respondent's U.S. sales to determine whether the "pattern" requirement provided under section 777A(d)(1)(B)(i) of the Act for investigations has been met. This in no way represents an attempt to predict current or future behavior by HiSteel, which itself will be examined if requested in any subsequent administrative reviews of this potential antidumping duty order.

Assuming *arguendo* that the Department's analysis was based on sampled data, HiSteel's cited "critical assumptions" of normal distributions and homoscedasticity are only ideal assumptions which are never present in reality.<sup>114</sup> Certainly a researcher designs his or her study to approach these ideals or any assumptions which are made in their analysis, but these are not requirements which must be met for the study to be valid. Furthermore, Cohen's descriptions of the practical significance of his small, medium and large thresholds<sup>115</sup> only includes these assumptions when

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<sup>112</sup> Id.

<sup>113</sup> See HiSteel's Case Brief at 6.

<sup>114</sup> Id. at 7-21.

<sup>115</sup> See Cohen, Jacob, Statistical Power Analysis for the Behavioral Sciences, Second Edition (1988) (Cohen) at 24-27; included in HiSteel's submission "Information Relating to 'Differential Pricing Analysis'" (January 15, 2016) at Attachment 1.

calculating the proportion of overlap of the two individual samples.<sup>116</sup> Despite HiSteel's lengthy discussion of the overlap of the two data samples, the Department has not relied upon these particular statistics regarding the proportion of overlap in supporting its analysis and use of these thresholds, which "have been widely adopted,"<sup>117</sup> but rather on the practical descriptions provided by Dr. Cohen.<sup>118</sup> Beyond the fact, as recognized by Dr. Cohen, that this concept may be "intuitively compelling and meaningful," this is not part of the Department's approach.

HiSteel additionally attempts to impugn the Department's reliance on Dr. Cohen's thresholds and the Department's non-analysis of the data's normality. Dr. Cohen's examples of real-life, practical examples of situations which exhibit a "large" difference "is represented by the mean IQ difference estimated between holders of the Ph.D. degree and typical college freshmen, or between college graduates and persons with only a 50-50 chance of passing an academic high school curriculum. These seem like grossly perceptible and therefore large differences, as does the mean difference in height between 13- and 18-year-old girls..."<sup>119</sup> In other words, Dr. Cohen was stating that it is obvious on its face that there are differences in intelligence between highly educated individuals and struggling high school students, and between the height of younger and older teenage girls. HiSteel argues that the definition of IQ has been developed where scores are normally distributed about a mean of 100, and that the height of individuals reasonably follows a normal distribution, therefore Dr. Cohen's analysis by inference included normal distributions.<sup>120</sup> However, Dr. Cohen never claimed that his inclusion of these obvious and largely disparate sample groups exhibited normal distribution of the underlying data, but rather he based his conclusions on the fact that these differences, alone, "seem like grossly perceptible and therefore large differences," to which any reasonable person would agree. Accordingly, HiSteel's argument is misplaced.

Lastly, HiSteel provides an analysis based on the SAS PROC UNIVARIATE to demonstrate that its U.S. sale prices did not follow a normal distribution.<sup>121</sup> As discussed above, the Department does not find that the type of data distribution is relevant to its calculation of Cohen's *d* coefficients as part of a differential pricing analysis. Consequently, HiSteel's analysis of its own U.S. sales data to evaluate its distribution is equally without merit.

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<sup>116</sup> See Cohen at 21 ("2.2.1 **d** AS A PERCENT NONOVERLAP: THE **U** MEASURES. *If we maintain the assumption that the populations being compared are normal and with equal variability (i.e., homoscedasticity), and conceive them further as equally numerous, it is possible to define measures of nonoverlap (U) associated with d which are intuitively compelling and meaningful.*" (emphasis added))

<sup>117</sup> See Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013) (Xanthan Gum from the PRC) and accompanying Issues and Decision Memorandum (IDM) at 25; quoting David Lane et al., Chapter 19 "Effect Size," Section 2 "Difference Between Two Means." See also Petitioner's submission "Petitioners' Factual Information to Rebut, Clarify, and Correct Differential Pricing Information Submitted by HiSteel on January 15, 2016" (January 22, 2016) at Exhibit 3" David Lane, et al., Online Statistics Education: A Multimedia Course of Study, Chapter 19: Effect Size".

<sup>118</sup> See Cohen at 24-27.

<sup>119</sup> Id. at 27.

<sup>120</sup> See HiSteel's Case Brief at 9, footnotes 12 and 13.

<sup>121</sup> Id. at 20-21.

### 3. Dr. Cohen’s “Small,” “Medium,” and “Large” Thresholds Are Arbitrary and Cannot Be Applied as Bright-Line Tests

The Department disagrees with HiSteel’s assertion that the three thresholds established by Dr. Cohen are arbitrary and impermissible in its analysis. As noted above, the Department’s examination of the two statutory requirements under section 777A(d)(1)(B) of the Act is by necessity a gap-filling exercise. The Department must exercise its discretion in order to fill such gaps in a reasonable and logical manner or else the Department would be unable to execute its obligation to administer the statute. Accordingly, the Department’s development of the differential pricing analysis and its use of Dr. Cohen’s small, medium, and large thresholds in this investigation are consistent with established law.

As stated in the Preliminary Determination, the purpose of the Cohen’s *d* test is to evaluate “the extent to which the prices to the particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise.”<sup>122</sup> The Cohen’s *d* coefficient is a recognized measure which gauges the extent (or “effect size”) of the difference between the means of two groups.

In Xanthan Gum from the PRC, the Department explained that “{e}ffect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone.” In addressing Deosen’s comment in Xanthan Gum from the PRC, the Department continued:

Effect size is the measurement that is derived from the Cohen’s *d* test. Although Deosen argues that effect size is a statistic that is “widely used in meta-analysis,” we note that the article also states that “{e}ffect size quantifies the size of the difference between two groups, and may therefore be said to be a true measure of the significance of the difference.” The article points out the precise purpose for which the Department relies on the Cohen’s *d* test to satisfy the statutory language, to measure whether a difference is significant.<sup>123</sup>

The Cohen’s *d* coefficient is based on the difference between the means of the test and the comparison groups relative to the variances within the two groups, *i.e.*, the pooled standard deviation. When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, this value is expressed in standardized units, and is based on the dispersion of the prices within each group. In other words, the “significance” of differences between the average prices of the test group and the comparison group (*i.e.*, between a specific purchaser, region, or time period and all other purchasers, regions, or time periods) is measured by how widely the individual prices differ within these two groups. When there is little variation in prices within each of these groups (not between the two groups), a small difference in the mean prices of the test and comparison groups will be found to be significant. Conversely, when there are wide variations in prices within each of these groups,

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<sup>122</sup> Id. at 5.

<sup>123</sup> See Xanthan Gum from the PRC, and accompanying Issues and Decision Memorandum at Comment 3 (emphasis in original).



then a much larger difference in the mean prices of the test and comparison groups will be necessary in order to find that the difference is significant.

The Department thus relies on the Cohen's  $d$  coefficient as a measure of effect size to determine whether the observed price differences are significant. In this application, the difference in the weighted-average (*i.e.*, mean) U.S. price to a particular purchaser, region, or time period (*i.e.*, the test group) and the weighted-average U.S. price to all other purchasers, regions, or time periods (*i.e.*, the comparison group) is measured relative to the variance of U.S. prices within each of these groups (*i.e.*, all U.S. prices).

In the final results of the administrative review of Shrimp from Vietnam, the Department stated:

The Department disagrees with VASEP's claim that the Cohen's  $d$  test's thresholds of "small," "medium," and "large" are arbitrary, and that consequently the Department should use a higher threshold for the Cohen's  $d$  coefficient in order to find that the sales of the test group pass the Cohen's  $d$  test. In his text Statistical Power Analysis for the Behavioral Sciences, Dr. Cohen himself describes these three cut-offs. The effect size at the small threshold "is the order of magnitude of the difference in mean IQ between twins and non-twins, the latter being the larger. It is also approximately the size of the difference in mean height between 15- and 16-year-old girls." For the medium threshold, the "effect size is conceived as one large enough to be visible to the naked eye. That is, in the course of normal experience, one would become aware of an average difference in IQ between clerical and semiskilled workers or between members of professional and managerial occupational groups" or "the magnitude of the difference in height between 14- and 18-year-old girls." For the large threshold, the difference "is represented by the mean IQ difference estimated between holders of the Ph.D. degree and typical college freshmen, or between college graduates and persons with only a 50-50 chance of passing an academic high school curriculum. These seem like grossly perceptible and therefore large differences, as does the mean difference in height between 13- and 18-year-old girls..."<sup>124</sup>

Although these descriptions by Dr. Cohen are qualitative in nature, they are not arbitrary, but represent real world observations. As noted above from Webster's dictionary,<sup>125</sup> "significant" has the following meanings:

1. having meaning;
2. a. having or likely to have influence or effect, of a noticeably or measurably large amount;

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<sup>124</sup> See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 20132014, 80 FR 55328 (September 15, 2015) (Shrimp from Vietnam), quoting from Cohen, Jacob, Statistical Power Analysis for the Behavioral Sciences, Lawrence Erlbaum Associates, Publishers (1988), at 27 (citations omitted).

<sup>125</sup> See Webster's Ninth New Collegiate Dictionary (1989), p. 1096.

b. probably caused by something other than mere chance.

Thus, the term “prices that differ significantly” connotes different prices where the difference has meaning, where it has or may have influence or effect, where it is noticeably or measurably large, and where it may be beyond something that occurs by chance. Certainly the examples for both Dr. Cohen’s medium and large thresholds for effect size reasonably meet this level of difference. But as the Department noted in its Preliminary Decision Memorandum, the Department used the large threshold because “the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups...”<sup>126</sup> In other words, the significance required by the Department in its Cohen's *d* test affords the greatest meaning to the difference of the means of the prices among purchasers, regions, and time periods.

In the final determination of Xanthan Gum from the PRC, the Department recognized:

In “Difference Between Two Means,” the author states that “there is no objective answer” to the question of what constitutes a large effect. Although Deosen focuses on this excerpt for the proposition that the “guidelines are somewhat arbitrary,” the author also notes that the guidelines suggested by Cohen as to what constitutes a small effect size, medium effect size, and large effect size “have been widely adopted.” The author further explains that Cohen's *d* is a “commonly used measure” to “consider the difference between means in standardized units.”<sup>127</sup>

Therefore, the Department continues to find that three thresholds established by Dr. Cohen have a substantive foundation in the real world and are therefore not arbitrary in the manner alleged by HiSteel. The thresholds also have been widely accepted by the academic community. Accordingly, the Department continues to find that their use as part of the Cohen’s *d* test is appropriate.

#### 4. The Department Fails to Explain Why the Pattern of Prices That Differ Significantly Were Not, or Could Not Be, Taken Into Account Using the Average-to-Average Method

The Department disagrees with the respondents’ assertion that it has not provided an adequate explanation why the average-to-average method cannot account for such differences. The Department agrees with HiSteel’s claim that “the mere existence of different results is plainly insufficient, by itself, to satisfy the {explanation requirement}.”<sup>128</sup> As explained in the Preliminary Determination, if the difference in the weighted-average dumping margins calculated using the average-to-average method and an appropriate alternative comparison method is meaningful, then this demonstrates that the average-to-average method cannot account

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<sup>126</sup> See Preliminary Determination, and accompanying Preliminary Decision Memorandum at 6.

<sup>127</sup> See Xanthan Gum from the PRC, at accompanying Issues and Decision Memorandum at Comment 3 (internal citations omitted); quoting from David Lane, et al., Chapter 19 “Effect Size,” Section 2 “Difference Between Two Means.”

<sup>128</sup> See HiSteel’s Case Brief at 26.

for price differences and, therefore, an alternative comparison method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if: 1) there is a 25 percent relative change in the weighted-average dumping margin between the A-A method and the appropriate alternative method when both margins are above the de minimis threshold; or 2) the resulting weighted-average dumping margin moves across the de minimis threshold.<sup>129</sup>

For both DOSCO and HiSteel in this final determination, the Department finds that the weighted-average dumping margins calculated using the average-to-average method and an alternative comparison method based on the average-to-transaction method are 0.00 percent and 2.34 percent, respectively, for DOSCO and 2.44 percent and 3.82 percent, respectively, for HiSteel. Thus, the results for both of these calculations move either across the de minimis threshold or result in a change in the rate of at least 25 percent, which the Department reasonably finds as a meaningful difference such that the average-to-average method cannot account for either DOSCO's or HiSteel's pricing behavior in the U.S. market. The CIT has affirmed the Department's use of the "meaningful difference" test to find that the average-to-average method cannot account for such differences.<sup>130</sup>

The Department also disagrees with HiSteel's claim that there is "no reason to believe that the price differences that give rise to a finding of 'targeted dumping' would be the cause of the different results from the different comparison methodologies."<sup>131</sup> "Targeted dumping" is described in the SAA as a situation where "an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."<sup>132</sup> Concern about "targeted dumping" arose out of the Department change in practice to using the average-to-average method from the average-to-transaction method in investigations with the implementation of the Uruguay Round Agreements Act (URAA). As a result, section 777A(d)(1)(B) of the Act was enacted to provide the Department with a tool to address "targeted dumping" by permitting the application of the average-to-transaction method. Thus, the SAA acknowledged the following:

New section 777A(d)(1)(B) provides for {the average-to-transaction method} in situations where an average-to-average or transaction-to-transaction methodology

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<sup>129</sup> See Preliminary Decision Memorandum at pages 6. See also, e.g., Polyethylene Terephthalate Film, Sheet, and Strip From India: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 11160 (March 2, 2015), and the accompanying Issues and Decision Memorandum at Comment 3; and Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review; 2012-2013, 80 FR 10051 (February 25, 2015) and the accompanying Issues and Decision Memorandum at Comment 2.

<sup>130</sup> See Apex at 38-45; see generally Samsung Electronics Co. v. United States, Slip Op. 15-158 (CIT June 12, 2015) (although Samsung involves the Department's earlier target dumping analysis rather than a differential pricing analysis, the question here is the same – whether the explanation requirement has been met. Further, Samsung not only affirmed the situation when the weighted-average dumping margin moves across the de minimis threshold, but also when there is a relative change in the weighted-average dumping margins of at least 25 percent as being "meaningful" and thus both thresholds provide an explanation which satisfies section 777A(d)(1)(B)(ii) of the Act).

<sup>131</sup> See HiSteel's Case Brief at 26.

<sup>132</sup> See SAA at 842.

cannot account for a pattern of prices that differ significantly among purchasers, regions, or time period, *i.e.*, where targeted dumping *may* be occurring.<sup>133</sup>

Thus, Congress provided the Department with a tool to address “targeted” or masked dumping, which it characterized as dumped prices to particular customers, regions, or time periods being offset by higher prices elsewhere. Although section 777A(d)(1)(B)(i) of the Act requires the Department to identify a pattern of prices that differ significantly among purchasers, regions, or time periods, Congress recognized that these may not be the only instances where “targeted dumping may be occurring.” Thus, the purpose to applying the alternative, average-to-transaction method is to unmask “targeted dumping,”<sup>134</sup> which may exist within the subset of U.S. sales which constitute a pattern of prices that differ significantly or within the subset of U.S. sales which do not constitute a pattern of prices that differ significantly. If the unmasked “targeted dumping” distorts the calculated results based on the average-to-average method, then the Department considers, pursuant to 19 CFR 351.414(c)(1), that the average-to-average method is not appropriate.

To consider the extent of the masking under the average-to-average method as opposed to an alternative comparison method based on the average-to-transaction method, the Department uses a “meaningful difference” test where it compares the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using the appropriate alternative comparison method. A meaningful difference in these two results is caused by higher U.S. prices offsetting lower U.S. prices where the dumping, which may be found on lower priced U.S. sales, is hidden or masked by higher U.S. prices, such that the average-to-average method would be unable to account for such differences. Such masking or offsetting of lower prices with higher prices may occur implicitly within the averaging groups or explicitly when aggregating the average-to-average comparison results. Therefore, in order to understand the impact of the unmasked “targeted dumping,” the Department finds that the comparison of each of the calculated weighted-average dumping margins using the standard and alternative comparison methodologies exactly quantifies the extent of the unmasked “targeted dumping.”

The simple comparison of the two calculated results belies all of the complexities in calculating and aggregating individual dumping margins (*i.e.*, individual results from comparing export prices, or constructed export prices, with normal values). It is the interaction of these many comparisons of export prices or constructed export prices with normal values, and the aggregation of these comparison results which determine whether there is a meaningful difference in these two calculated weighted-average dumping margins. When using the average-to-average method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by

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<sup>133</sup> See SAA at 843 (emphasis added).

<sup>134</sup> See U.S. Steel Corp. v. United States, 621 F.3d 1351, 1363 (Fed. Cir. 2010) (U.S. Steel) (“... the exception contained in §1677f-1(d)(1)(B) indicates that Congress gave Commerce a tool for combating targeted or masked dumping by allowing Commerce to compare weighted average normal value to individual transaction values when there is a pattern of prices that differs significantly among purchasers, regions, or periods of time. Commerce has indicated that it likely intends to continue its zeroing methodology in those situations, thus alleviating concerns of targeted or masked dumping. That threat has been one of the most consistent rationales for Commerce’s zeroing methodology in the past.” (citations omitted)).

higher-priced U.S. sales. Again, this is reflected in the SAA which states that “targeted dumping” is a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”<sup>135</sup> The comparison of a weighted-average dumping margin based on comparisons of weighted-average U.S. prices that also reflects offsets for non-dumped sales, with a weighted-average dumping margin based on comparisons of individual U.S. prices without such offsets (*i.e.*, with zeroing) precisely examines the impact on the amount of dumping which is hidden or masked by the average-to-average method. Both the weighted-average U.S. price and the individual U.S. prices are compared to a normal value that is independent from the type of U.S. price used for comparison, and this normal value will be constant because the characteristics of the individual U.S. sales<sup>136</sup> remain constant whether weighted-average U.S. prices or individual U.S. prices are used in the analysis.

Consider the simple situation where there is a single, weighted-average U.S. price, and this average is made up of a number of individual U.S. sales which exhibit different prices, and the two comparison methods under consideration are the average-to-average method with offsets (*i.e.*, without zeroing) and the average-to-transaction method with zeroing.<sup>137</sup> The normal value used to calculate a weighted-average dumping margin for these sales may fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

- 1) the normal value is less than all of the U.S. prices and there is no dumping;
- 2) the normal value is greater than all of the U.S. prices and all sales are dumped;
- 3) the normal value is nominally greater than the lowest U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;<sup>138</sup>
- 4) the normal value is nominally less than the highest U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;

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<sup>135</sup> See SAA at 842.

<sup>136</sup> These characteristics include may include such items as product, level-of-trade, time period, and whether the product is considered as prime- or second-quality merchandise.

<sup>137</sup> The calculated results using the average-to-average method with offsets (*i.e.*, no zeroing) and the calculated results using the average-to-transaction method with offsets (*i.e.*, no zeroing) will be identical. See Attachment 2 of DOSCO Final Calculation Memo (pages 123-125 of the SAS output); and Attachment 2 of HiSteel Final Calculation Memo (pages 180-182), where the calculation results of the average-to-average method and each of the alternative comparison methods are summarized. The sum of the “Positive Comparison Results” and the “Negative Comparison Results” for each of the three comparison methods (*i.e.*, the average-to-average method, the “mixed” method, and the average-to-transaction method, are identical, *i.e.*, with offsets for all non-dumped sales (*i.e.*, negative comparison results), the amount of dumping is identical. As such, the difference between the calculated results of these comparison methods is whether negative comparison results are used as offsets or set to zero.

<sup>138</sup> As discussed further below, please note that scenarios 3, 4 and 5 imply that there is a wide enough spread between the lowest and highest U.S. prices so that the differences between the U.S. prices and normal value can result in a significant amount of dumping and/or offsets, both of which are measured relative to the U.S. prices.

- 5) the normal value is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant amount of offsets generated from non-dumped sales.

Under scenarios (1) and (2), either there is no dumping or all U.S. sales are dumped such that there is no difference between the weighted-average dumping margins calculated using offsets or zeroing and there is no meaningful difference in the calculated results. Under scenario (3), there is a minimal (*i.e.*, de minimis) amount of dumping, such that the application of offsets will result in a zero or de minimis amount of dumping (*i.e.*, the average-to-average method with offsets and the average-to-transaction method with zeroing both results in a weighted-average dumping margin which is either zero or de minimis) and which also does not constitute a meaningful difference. Under scenario (4), there is a significant (*i.e.*, non-de minimis) amount of dumping with only a minimal amount of non-dumped sales, such that the application of the offsets for non-dumped sales does not change the calculated results by more than 25 percent, and again there is not a meaningful difference in the weighted-average dumping margins calculated using offsets or zeroing. Lastly, under scenario (5), there is a significant, non-de minimis amount of dumping and a significant amount of offsets generated from non-dumped sales such that there is a meaningful difference in the weighted-average dumping margins calculated using offsets and zeroing.

Only under scenarios (3), (4) and (5) are the granting or denial of offsets relevant to whether dumping is being masked, as there are both dumped and non-dumped sales. Under scenario (3), there is only a de minimis amount of dumping such that the extent of available offsets will only make this de minimis amount of dumping even smaller and have no impact on the outcome. Under scenario (4), there exists an above-de minimis amount of dumping, and the offsets are not sufficient to meaningfully change the results. Only with scenario (5) is there an above-de minimis amount of dumping with a sufficient amount of offsets such that the weighted-average dumping margin will be meaningfully different under the average-to-transaction method with zeroing as compared to the average-to-transaction / average-to-average method with offsets. This difference in the calculated results is meaningful in that a non-de minimis amount of dumping is now masked or hidden to the extent where the dumping is found to be zero or de minimis or to have decreased by 25 percent of the amount of the dumping with the applied offsets.

This example demonstrates that there must be a significant and meaningful difference in U.S. prices in order to resort to an alternative comparison method. These differences in U.S. prices must be large enough, relative to the absolute price level in the U.S. market, where not only is there a non-de minimis amount of dumping, but there also is a meaningful amount of offsets to impact the identified amount of dumping under the average-to-average method with offsets. Furthermore, the normal value must fall within an even narrower range of values (*i.e.*, narrower than the price differences exhibited in the U.S. market) such that these limiting circumstances are present (*i.e.*, scenario (5) above). This required fact pattern, as represented in this simple situation, must then be repeated across multiple averaging groups in the calculation of a weighted-average dumping margin in order to result in an overall weighted-average dumping margin which changes to a meaningful extent.

Further, for each average-to-average comparison result which does not result in set of circumstances in scenario (5), the “meaningfulness” of the difference in the weighted-average dumping margins between the two comparison methods will be diminished. This is because for these average-to-average comparisons which do not exhibit a meaningful difference with the average-to-transaction comparisons, there will be little or no change in the amount of dumping (*i.e.*, the numerator of the weighted-average dumping margin) but the U.S. sales value of these transactions will nonetheless be included in the total U.S. sales value (*i.e.*, the denominator of the weighted-average dumping margin). The aggregation of these intermediate average-to-average comparison results where there is no “meaningful” difference will thus dilute the significance of other average-to-average comparison results where there is a “meaningful” difference, which the average-to-transaction method avoids.

Additionally, the extent of the amount of dumping and potential offsets for non-dumped sales is measured relative to the total export value (*i.e.*, the denominator of the weighted-average dumping margin) of the subject merchandise. Thus, the “targeted dumping” analysis accounts for the difference in the U.S. prices relative to the absolute price level of the subject merchandise. Only under scenario (5) above will the Department find that the average-to-average method is not appropriate – where there is an identifiable above *de minimis* amount of dumping along with an amount of offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful amount when those offsets are applied. Both of these amounts are measured relative to the total export value (*i.e.*, absolute price level) of the subject merchandise sold by the exporter in the U.S. market.

With respect to HiSteel’s acclamation that the “{d}ifferences in dumping margins generated by the application of ‘zeroing’ are not the same differences in dumping margins caused by patterns of price differences by customer, region, or time period,”<sup>139</sup> we disagree. Indeed, the masking of DOSCO’s dumping is such that the average-to-average method showed no amount of dumping at all. By contrast, the average-to-transaction method reveals above *de minimis* dumping.<sup>140</sup> For HiSteel, although the average-to-average method reveals some dumping, 2.44 percent, the more accurate accounting for HiSteel’s pricing behavior reveals dumping at an overall rate of 3.82 percent, about a 56 percent undercounting of HiSteel’s dumping in the U.S. market<sup>141</sup> If the

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<sup>139</sup> See HiSteel’s Case Brief at 27.

<sup>140</sup> To the extent that HiSteel is alleging that the Department should not be applying zeroing in its average-to-transaction comparisons, because it “creates” the meaningful difference in the first place, the CIT in *Apex* held that the “purpose” of applying the average-to-transaction method is to “reveal those cases where offsetting masks dumping, and that purpose is achieved by zeroing.” *Apex* at 44. The Court explained that without zeroing the results of the average-to-average and average-to-transaction comparisons would be mathematically equivalent, obviating any benefit derived from the provision of a statutory alternative. *Id.* The Court therefore held that “The zeroing characteristic of A-T is inextricably linked to the comparison methodology and its effect in the meaningful difference analysis does not render the approach unreasonable.” *Id.* at 44-45.

<sup>141</sup> To the extent that HiSteel is alleging that the Department should not be applying zeroing in its average-to-transaction comparisons, because it “creates” the meaningful difference in the first place, the CIT in *Apex* held that the “purpose” of applying the average-to-transaction method is to “reveal those cases where offsetting masks dumping, and that purpose is achieved by zeroing.” *Apex* at 44. The Court explained that without zeroing the results of the average-to-average and average-to-transaction comparisons would be mathematically equivalent, obviating any benefit derived from the provision of a statutory alternative. *Id.* The Court therefore held that “The

average-to-average method had been the basis for this final determination, then masking would have resulted in DOSCO being excluded from any potential antidumping duty order due to its pricing behavior in the U.S. market, and a greatly undervalued remedy for HiSteel's pricing behavior. In this situation, Congress's intent of addressing "targeted dumping," when the requirements of section 777A(d)(1)(B) of the Act are satisfied,<sup>142</sup> would be thwarted with regard to HiSteel and DOSCO if the average-to-average method were applied. It is for this reason that the Department finds that the average-to-average method cannot take into account the pattern of prices that differ significantly for either respondent, *i.e.*, the conditions where "targeted" or masked dumping "may be occurring." Thus, it is for this reason that the Department continues to find that application of the average-to-transaction method is appropriate for both HiSteel and DOSCO in this final determination.

#### 5. The Department is not Permitted to Utilize the Average-to-Transaction Method for HiSteel's U.S. sales

For the final determination, the Department's analysis established that there is a pattern of U.S. prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time in HiSteel's U.S. sales. Based on the results of the differential pricing analysis, the Department finds that 69.55 percent of HiSteel's U.S. sales pass the Cohen's *d* test, which confirms the existence of a pattern of prices for comparable merchandise that differ significantly among purchasers, regions, or time periods, and supports the consideration of an alternative to the average-to-average method for all sales. Further, the Department determines that the average-to-average method cannot appropriately account for such differences because there is a meaningful difference in the weighted-average dumping margins calculated using the average-to-average method and an alternative method based on the average-to-transaction method applied to all U.S. sales. Specifically, the Department determines that the average-to-average method cannot appropriately account for such differences because the resulting weighted-average dumping margin differs by more than 25 percent. Accordingly, the Department determines to use the average-to-transaction method for all U.S. sales to calculate the weighted-average dumping margin for HiSteel.

For the final determination, the Department's analysis established that there is a pattern of U.S. prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time in DOSCO's U.S. sales. Based on the results of the differential pricing analysis, the Department find that 81.93 percent of DOSCO's U.S. sales pass the Cohen's *d* test, which confirms the existence of a pattern of prices for comparable merchandise that differ significantly among purchasers, regions, or time periods, and supports the consideration of an alternative to the average-to-average method for all sales. Further, the Department determines that the average-to-average method cannot appropriately account for such differences because there is a meaningful difference in the weighted-average dumping margins calculated using the average-to-average method and an alternative method based on the average-to-transaction method applied to all U.S. sales. Specifically, the Department determines that the average-to-average method

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zeroing characteristic of A-T is inextricably linked to the comparison methodology and its effect in the meaningful difference analysis does not render the approach unreasonable." *Id.* at 44-45.

<sup>142</sup> See SAA at 842-843.



cannot appropriately account for such differences because the resulting weighted-average dumping margin moves across the de minimis threshold. Accordingly, the Department determines to use the average-to-transaction method for all U.S. sales to calculate the weighted-average dumping margin for DOSCO as permitted by section 777A(d)(1)(B) of the Act.

## 6. The Implementation of WTO Panel Decisions

Both HiSteel and DOSCO are incorrect that the Department must automatically implement WTO reports. The CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the URAA.<sup>143</sup> In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.<sup>144</sup> As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department’s discretion in applying the statute.<sup>145</sup>

With regard to the average-to-transaction method, specifically, as an alternative comparison method under the second sentence of Article 2.4.2 of the WTO Antidumping Agreement, the Department has issued no new determination and the United States has adopted no change to its practice pursuant to the statutory requirements of sections 123 or 129 of the URAA.

### Comment 6: Verification Corrections

The petitioners note that the Department requested and received revised databases from DOSCO after verification, but that it did not request new databases from HiSteel. The petitioners maintain that the Department should ensure that HiSteel’s corrections arising from verification are reflected in its final calculations. The petitioners also maintain that the Department should revise DOSCO’s credit expenses and raw materials costs to use the most up-to-date information because this information was omitted from the revised databases.

DOSCO contends that the Department should rely on its revised databases without adjustment, with the exception of indirect selling expenses. According to DOSCO, the Department verified a correction to these expenses but failed to request that the correction be incorporated in the revised databases.

### Department’s Position:

We revised HiSteel’s calculations to incorporate all changes arising from verification.<sup>146</sup> We also relied on DOSCO’s most recently-submitted sales and cost databases, and we incorporated

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<sup>143</sup> See *Corus Staal BV v. U.S. Dep’t of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied 126 S. Ct. 1023 (2006); accord *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).

<sup>144</sup> See, e.g., 19 U.S.C. § 3533, 3538 (sections 123 and 129 of the URAA).

<sup>145</sup> See, e.g., 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary).

<sup>146</sup> See HiSteel Final Calculation Memo.

the above-noted changes to credit expenses, indirect selling expenses, and raw materials costs based on our findings from verification.<sup>147</sup>

#### Comment 7: DOSCO's CEP Offset Claim

In the Preliminary Determination, we analyzed the selling functions DOSCO performed to make sales in the home market and to its U.S. affiliate, DOSCO America. Based on this analysis, we determined that DOSCO's sales to the U.S. and home markets were at the same level of trade (LOT) during the POI. Therefore, we did not grant DOSCO a CEP offset for the Preliminary Determination.<sup>148</sup>

DOSCO disagrees with the Department's LOT analysis, arguing that its home market LOT is more advanced than its CEP LOT and, thus, it is entitled to a CEP offset. DOSCO notes that the Department grants CEP offsets when it determines that the home market LOT is more advanced based on the number of selling activities performed to support sales at each marketing stage and the intensity of those activities. DOSCO points to its selling functions chart submitted on the record which shows that it performed 12 selling activities to sell in the home market, while it performed only four selling activities for sales to DOSCO America.<sup>149</sup> According to DOSCO, the Department relies on a respondent's selling activities chart and accompanying narrative in determining whether a company qualifies for a CEP offset.<sup>150</sup>

DOSCO asserts that DOSCO America performs the core selling functions related to the reported CEP sales, including negotiations with and invoicing of, unaffiliated U.S. customers, obtaining payments from those customers, and maintaining relationships with them. DOSCO notes that DOSCO America also performs research and analysis of market prices, developing trends, and supply and demand issues in the U.S. market, which it transmits to DOSCO for incorporation into DOSCO's reports.<sup>151</sup> Thus, DOSCO asserts that its sales personnel in Korea conduct an insignificant amount of selling activities to sell to DOSCO America.<sup>152</sup> Given these facts, DOSCO has no need to perform independent market research or to prepare sales forecasts or sales plans to support its sales to DOSCO America. Rather, DOSCO asserts that it merely receives and processes orders placed by DOSCO America and arranges for freight from Korea to the place of delivery.

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<sup>147</sup> See DOSCO Final Calculation Memo.

<sup>148</sup> See Preliminary Determination, and accompanying Preliminary Decision Memorandum, at 12.

<sup>149</sup> DOSCO cites DOSCO Supplemental Sections A-C Response, at Exhibit SA-6.

<sup>150</sup> DOSCO cites Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Administrative Review, 73 FR 14220 (March 17, 2008), and accompanying Issues and Decision Memorandum at Comment 3.

<sup>151</sup> As support for this assertion, DOSCO cites DOSCO Sales Verification Report, at 16, and verification exhibit 4, showing DOSCO America's 2015 sales forecast, which it maintains is based on DOSCO America's analysis and communications with customers.

<sup>152</sup> DOSCO argues that, as it noted at verification, the number of sales personnel in Korea dedicated to U.S. sales is fewer than the number of home market sales personnel. Thus, DOSCO asserts that its "direct sales personnel" activity should be changed to "low." Consequently, DOSCO maintains that its direct sales and marketing activities to support its home market sales are at a high intensity level compared to the low level required to sell to DOSCO America. DOSCO cites DOSCO Sales Verification Report, at 6.

DOSCO asserts that, in contrast, DOSCO performs substantial home market selling functions because it is responsible for all pre- and post-sale activities, and it must proactively communicate with home market customers in order to receive orders. DOSCO asserts that it performs the following activities in the home market: actively preparing sales forecasts for home market sales, examining its product inventories routinely to promote products, performing periodic personnel training, processing customer complaints, regularly engaging in market research regarding product pricing, and frequently preparing strategic business plans for management. DOSCO argues that these selling activities in the aggregate are substantial, such that they reasonably constitute a marketing stage that differs from the stage at which DOSCO sells to DOSCO America.<sup>153</sup> DOSCO notes that, when selling activities are collapsed into general categories, DOSCO performed three of the four categories for its home market sales, whereas it performed only two of the categories for its CEP sales.<sup>154</sup> According to DOSCO, these additional selling functions are in fact substantial and are supported by documentation on the record covering the POI.<sup>155</sup>

Finally, DOSCO requests that the Department take into consideration the level of indirect selling expenses that DOSCO assigned to its domestic sales compared with those attributed to export sales.<sup>156</sup> DOSCO argues that the fact that labor expenses for domestic sales are higher demonstrates that DOSCO performs substantially greater home market selling activities (and requires more personnel).<sup>157</sup> DOSCO argues that the Department has granted CEP offsets in similar situations (i.e., where the record demonstrates that the U.S. affiliate performs significant selling functions in the U.S. market).<sup>158</sup> Therefore, based on the information on the record,

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<sup>153</sup> DOSCO further argues that DOSCO's more substantial POI home market sales volume compared to the U.S. sales volume demonstrates that DOSCO's direct sales personnel undertook activities were more intense than those related to export sales.

<sup>154</sup> DOSCO cites its November 19, 2015, Supplemental Section A response (DOSCO's Supplemental Section A Response), at SA-4.

<sup>155</sup> DOSCO cites DOSCO's Supplemental Section A-C Response, at Exhibit SA-5. DOSCO also claims that the verification reports and exhibits include POI documentation demonstrating that DOSCO performs sales forecasting, strategic/economic planning, market research, personnel training, and sales/marketing support for its home market sales but not for its sales to DOSCO America; however, DOSCO does not cite specific examples.

<sup>156</sup> DOSCO cites Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand, 69 FR 76918, 76920 (December 23, 2004) (Shrimp from Thailand), and accompanying Issues and Decision Memo at Comment 5 (where the Department considered a respondent's indirect selling expense ratios in combination with the analysis of selling functions in order to determine if the ratios substantiated the explanation of selling functions).

<sup>157</sup> DOSCO's home market indirect selling expenses are based on labor costs associated with domestic product sales along with common expenses allocated to domestic and export sales according to the proportion of labor costs. DOSCO's indirect selling expenses for domestic sales are greater than those related to export sales.

<sup>158</sup> As support for this assertion, DOSCO cites Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Korea, 67 FR 62124 (October 3, 2002), and accompanying Issues and Decision Memorandum at Comment 10; Certain Magnesite Bricks from Mexico: Notice of Final Determination of Sales at Less Than Fair Value, 75 FR 45097 (August 2, 2010), and accompanying Issues and Decision Memorandum at Comment 2; Stainless Steel Sheet and Strip in Coils from Germany: Notice of Preliminary Results of Antidumping Duty Administrative Review, 71 FR 45024, 45029 (August 8, 2006) (unchanged in Stainless Steel Sheet and Strip in Coils from Germany: Notice of Final Results of Antidumping Duty

DOSCO argues that the Department should grant it a CEP offset in order to ensure a fair comparison between NV and CEP.

The petitioners argue that the Department should continue to deny DOSCO's CEP offset claim for the final determination because: 1) DOSCO did not provide sufficient evidence to support its claim, thus failing to meet its burden of demonstrating different LOTs between markets, as established in Ad Hoc Shrimp<sup>159</sup>; 2) no additional information has been placed on the record since the Preliminary Determination to warrant granting DOSCO a CEP offset; and 3) the Department's practice with respect to granting CEP offsets does not support granting one to DOSCO in this case.

According to the petitioners, respondents are entitled to a CEP offset only where NV is determined to be at a more advanced LOT than the CEP LOT.<sup>160</sup> The petitioners point to 19 CFR 351.412(c)(2), which requires substantial differences in the selling activities performed for the home market and U.S. sales prior to finding different LOTs. According to the petitioners, while the Department recognized in the Preliminary Determination that DOSCO reported additional selling functions related to its home market sales, it found that these additional functions (e.g., annual sales forecasting, monthly sales planning, making stock ledgers and order sheets) are not substantial.<sup>161</sup>

Further, the petitioners note that DOSCO reported activities supporting both the home and U.S. markets in three of the four categories for which activities were reported, including packing for both markets, at the same, high level of intensity.<sup>162</sup> The petitioners argue that DOSCO's reporting of certain common activities at a high level of intensity refutes its characterization of CEP selling activities as insignificant. The petitioners note that, in response to the Department's request for POI documentation supporting the additional selling activities undertaken for home market sales, DOSCO provided documentation that: 1) fell outside of the POI; and 2) did not adequately respond to the Department's questions.<sup>163</sup> Thus, the petitioners maintain that the

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Administrative Review, 71 FR 74897 (December 13, 2006); Notice of Final Results of the Tenth Administrative Review and New Shipper Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 70 FR 12443 (March 14, 2005), and accompanying Issues and Decision Memorandum at Comment 4; and Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 67 FR 78417 (December 24, 2002), and accompanying Issues and Decision Memorandum at Comment 6.

<sup>159</sup> The petitioners note that the CIT emphasized the burden for entitlement to CEP offset claims falls on the respondent in Ad Hoc Shrimp Trade Action Committee v. United States, 33 CIT 533, 566 (CIT 2009) (Ad Hoc Shrimp).

<sup>160</sup> The petitioners cite 19 CFR 351.413(f)(ii).

<sup>161</sup> The petitioners cite Preliminary Determination, and accompanying Preliminary Decision Memorandum at 12 (citing DOSCO's Supplemental Section A Response, at 4-5 and Exhibit SA-5).

<sup>162</sup> The petitioners assert that the Department should treat packing as a separate category for the CEP offset analysis, as was done in Certain Hot-Rolled Steel Flat Products from the Republic of Turkey: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 81 FR 15321 (March 22, 2016), and accompanying Issues and Decision Memorandum at 16.

<sup>163</sup> The petitioners note that, in the Preliminary Determination, the Department stated that "DOSCO failed to provide POI documentation to support its claim with respect to the intensity at which certain home market selling activities

record evidence does not provide a compelling basis for granting a CEP offset given that DOSCO reported performing the same activities at the same level of intensity for multiple categories of selling functions.

The petitioners note that at verification, DOSCO: 1) modified the level of intensity for its CEP selling activity “Direct Sales Personnel” from “high” to “low” because the number of sales personnel involved in U.S. sales is fewer when compared with the number of home market personnel; and 2) stated that it had nothing else to add regarding DOSCO’s reported selling activities.<sup>164</sup> The petitioners argue that the number of people performing a given activity does not necessarily reflect its level of intensity; rather, the petitioners assert that, given the large volume of U.S. sales during the POI, the export direct sales promotion team must have performed their activities at a high level of intensity. Further, the petitioners contend that there is no reason that DOSCO sales personnel in Korea would refrain from providing certain sales activities for its U.S. affiliate, especially given the fact that DOSCO America has only limited staff handling North American sales.<sup>165</sup>

Finally, the petitioners argue that Shrimp from Thailand does not support DOSCO’s position, because in that case the Department: 1) examined the indirect selling ratios only to substantiate the narrative of the respondent’s selling functions; and 2) denied the CEP offset because the respondent failed to provide sufficient evidence to support its claim.<sup>166</sup> Consequently, the petitioners maintain that there is no additional compelling evidence on the record regarding DOSCO’s selling activities since the Preliminary Determination, and, as a result, the Department should continue to deny DOSCO’s CEP offset claim for the final determination.

#### Department’s Position:

We continue to find that a CEP offset is not warranted for DOSCO for the final determination. Section 773(a)(7)(B) of the Act requires an adjustment to NV in the form of a CEP offset if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability. The Department’s regulations at 19 CFR 351.412(c)(2) outline the Department’s policy regarding differences in the LOTs as follows:

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were performed, despite the Department’s request that it do so.” See Preliminary Decision Memorandum, at 12; see also DOSCO’s Supplemental Sections A-C Response, at Exhibit SA-5, where DOSCO provided supporting documentation for activities performed outside the POI.

<sup>164</sup> The petitioners cite DOSCO Sales Verification Report, at 6.

<sup>165</sup> Specifically, the petitioners note that in the Preliminary Decision Memorandum, the Department stated: “it remains unclear that such activities performed by DOSCO for its home market would not be performed for DOSCO’s sales to DOSCO America or to the Korean trading company (e.g., sales forecasting and strategic/economic planning).” The petitioners cite the Preliminary Decision Memorandum, at 12.

<sup>166</sup> The petitioners cite Shrimp from Thailand, and accompanying Issues and Decision Memorandum at Comment 6. The petitioners also cite Silicomanganese from Australia: Final Determination of Sales at Less Than Fair Value, 81 FR 8682 (February 22, 2016) and accompanying Issues and Decision Memorandum at Comment 2 (where the Department denied the respondent’s CEP offset claim because it failed to provide sufficient evidence to demonstrate that the selling functions performed at the CEP and home market LOTs were significantly different to warrant finding the home market LOT at a more advanced stage of distribution); and Thai Shrimp AR1.

The Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing.<sup>167</sup>

In the Preliminary Determination, we analyzed DOSCO's U.S. and home market selling functions, and we organized them into the following four categories for analysis: 1) sales and marketing; 2) freight and delivery; 3) inventory maintenance and warehousing; and 4) warranty and technical support. For DOSCO's U.S. sales we found that:

.....DOSCO reported that it performed the following selling functions in Korea for both its CEP and EP sales: packing; order input/processing; employment of direct sales personnel; and handling of freight and delivery arrangements. Based on these selling function categories, we find that DOSCO performed sales and marketing and freight and delivery services for all of its U.S. sales. . .<sup>168</sup>

In addition, in the home market we found that:

According to DOSCO, it performed the following selling functions for sales to all home market customers: sales forecasting; strategic/economic planning; personnel training/exchange; advertising; sales promotion; packing; inventory maintenance; order input/processing; employment of direct sales personnel; sales/marketing support; market research; and handling of freight and delivery arrangements. . . Based on these selling function categories, we find that DOSCO performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for its home market sales.....<sup>169</sup>

In this case, DOSCO claims that it performed additional selling activities (i.e., sales forecasting, strategic/economic planning, personnel training/exchange, advertising, inventory maintenance, sales/marketing support, and market research) for home market sales, and that these additional selling activities constitute a higher LOT. While we acknowledge that the selling functions performed for home market customers may have entailed additional activities, we disagree that these activities were so significant that they constituted a different marketing stage. Further, it is unclear based on the record whether DOSCO performed certain of these activities in relation to its U.S. sales.

We addressed DOSCO's claim in our Preliminary Determination as follows:

Finally, we compared the U.S. LOT to the home market LOT. While DOSCO reported additional selling functions related to its home market sales, we find that these additional functions (e.g., annual sales forecasting monthly sales planning,

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<sup>167</sup> See 19 CFR 351.412(c)(2) (emphasis added).

<sup>168</sup> See Preliminary Determination, and accompanying Preliminary Decision Memorandum, at 11-12.

<sup>169</sup> Id., at 12.

making stock ledgers, making order sheets) are not substantial. Further, it remains unclear that such activities performed by DOSCO for its home market sales would not be performed for DOSCO's sales to DOSCO America or to the Korean trading company (e.g., sales forecasting and strategic/economic planning). Finally, DOSCO failed to provide POI documentation to support its claim with respect to the intensity at which certain home market selling activities were performed, despite the Department's request that it do so. Consequently, we do not find the selling functions performed by DOSCO for its home market customers to be significantly different from those performed for its sales to DOSCO America, such that they would constitute a different marketing stage. Therefore, we preliminarily determine that sales to the home market during the POI were made at the same LOT as sales to the United States. Because DOSCO's home market LOT is not at a more advanced stage of distribution than DOSCO's U.S. LOT, a CEP offset is not warranted.<sup>170</sup>

DOSCO's renewed claim is based on the fact that the domestic sales team: 1) prepared sales forecasts for home market sales but not for sales to DOSCO America; 2) examined its inventory and promoted products to home market customers in order to make sales; 3) performed periodic personnel training; 4) processed customer complaints; 5) engaged in market research regarding product pricing; and 6) prepared strategic business plans for management.

We agree with the petitioners that the respondent bears the burden of demonstrating its entitlement to a CEP offset. As the petitioners correctly note, we analyzed DOSCO's claim for a CEP offset in the initial stages of this investigation and requested additional information from DOSCO to support the claim. However, as discussed above, DOSCO was unable to provide adequate support for its claim.<sup>171</sup> Although we conducted verification of DOSCO, we disagree that this verification exhibited significant differences in selling functions between home market and CEP sales; rather, DOSCO affirmatively stated that it had no additional information or documentation to add regarding its reported selling activities beyond the already-existing record evidence.<sup>172</sup> We note that, while DOSCO provided certain sample reports (i.e., sales forecasting for both domestic and export sales, market research, customer complaints, company training, and

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<sup>170</sup> Id. (footnotes omitted)

<sup>171</sup> For example, the Department requested that DOSCO provide a list of the specific activities that it performed as part of its "sales forecasting," "strategic/economic planning," "personnel training/exchange," "advertising," "sales promotion," "sales marketing/support," and "market research." See the Department's Supplemental Questionnaire to DOSCO, dated December 4, 2015, at 2-3. The Department also requested that DOSCO indicate how often it performed each of these activities and to provide supporting documentation. Id. In response, DOSCO merely provided a chart showing no specific activities in any of these categories. Further, while it did indicate how frequently it had activity in each general category, it merely provided a list of documents purporting to support these claims without indicating how these documents related to the claim and without providing samples of all of the documents themselves. See DOSCO Supplemental Sections A-C Response, at 4-5 and Exhibit SA-5. Of the documents that DOSCO did provide, many were dated outside the POI and did not clearly relate to sales of HWR pipes and tubes. See Memorandum to the File from Alice Maldonado, Senior Analyst, entitled, "Business Proprietary Information (BPI) Related to DOSCO's CEP Offset Claim in the Antidumping Duty Investigation of Heavy Walled Rectangular Pipes and Tubes from the Republic of Korea," (BPI disclosure memo) dated July 14, 2016.

<sup>172</sup> See DOSCO Sales Verification Report, at 6.

reports for corporate meetings), DOSCO did not proffer, and the Department did not discuss, such reports in the context of DOSCO's CEP offset claim. Instead, DOSCO merely presented them as examples of the types of reports prepared during the POI in the context of accounting and data reporting.<sup>173</sup> Thus, the record does not establish that these reports constitute the full universe of reports prepared by DOSCO, nor does the record contain complete information related to the purpose of the reports, the frequency with which they were prepared, or other factors which would be relevant to the Department's LOT analysis. Additionally, the record does not contain complete English translations for some of these reports and the narrative of the sales verification report contains no additional specifics regarding their contents.<sup>174</sup>

With respect to the specific activities highlighted by DOSCO, we disagree that the record contains evidence of significant differences between markets. For example, we note that the documentation provided for sales forecasting and market research does not strictly pertain to the home market, but rather it includes general information.<sup>175</sup> Similarly, regarding personnel training, the record does not demonstrate that staff associated with home market sales receive training that is greater than the training received by U.S. sales staff. Even the sample document on staff training provided by DOSCO to support its claim appears to reference sales both inside and outside of Korea.<sup>176</sup>

Further, while we recognize that most of DOSCO's sales to DOSCO America are made to order, while home market sales are often made from inventory, and that DOSCO occasionally handles customer complaints, we disagree that either DOSCO's review of its inventory (or the use of stock ledgers)<sup>177</sup> or handling of complaints is a significant selling activity, given that these are basic selling functions at best, nor do we find that either activity creates a difference in the marketing stages. Similarly, regarding DOSCO's preparation of "strategic business plans" for management, we disagree that the existence of these plans demonstrates that DOSCO operates at a different marketing stage in the home market because the plan on the record merely contains general planning information such as basic high-level annual sales strategies.<sup>178</sup> Regarding DOSCO's market research for product pricing, we note that the only information on the record to support DOSCO's claim was obtained at verification and it suffers from the defects noted above.

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<sup>173</sup> Id., at 6 and verification exhibit 3 which contains sample copies of all of these reports except customer complaints and company training. See also the Department's verification agenda to DOSCO, dated March 1, 2016, at 3.

<sup>174</sup> The documents included in verification exhibit 3 include: 1) 2014 tax return (mostly untranslated); 2) a trial balance for one month of the POI; 3) two screen shots of data in DOSCO's accounting system (largely untranslated); 4) a "sales analysis report" (untranslated, consisting of a single ledger page relating to exports); 5) a 2014 and a 2015 report labeled "DOSCO sales head office" (all but two pages of which are untranslated); 6) "sales conference in 2014 report" (mostly untranslated, but indicating that it includes both domestic and export information); 7) a five-page "price search" document (four pages of which are untranslated, and none of which clearly references HWR pipes and tubes); and 8) a 2015 export business plan (untranslated). Because these documents are untranslated, it is impossible to determine even the most basic details about them, including, among other things, what markets and products they relate to and what activities are performed.

<sup>175</sup> See DOSCO's Supplemental Sections A-C Response, at Exhibit SA-5. See also BPI disclosure memo.

<sup>176</sup> Id.

<sup>177</sup> Id.

<sup>178</sup> Id.



Consequently, when DOSCO's selling activities are viewed as a whole, we find that the differences between those activities performed for home market and U.S. sales do not rise to the level of a "substantial difference in selling activities," or that DOSCO's U.S. and home market sales were at different stages of marketing (or their equivalent). DOSCO argues in essence that, because it performs more activities in an absolute sense in the home market, it is entitled to a CEP offset. However, we disagree with DOSCO that the Department's CEP offset analysis is a formulaic exercise that can be resolved simply by comparing the relative number of selling activities performed in the home and U.S. markets. As noted above, the Department examines the extent of the activities performed and their significance to the company's selling operations. Thus, it is immaterial that DOSCO checked twelve boxes in its home market selling function analysis and only four in its U.S. selling function analysis. The record shows that DOSCO's additional home market selling functions did not result in sales at a different marketing stage, as required by the Department's regulations. Therefore, we do not find that DOSCO's home market was at a more advanced LOT, a precondition for the granting of a CEP offset.<sup>179</sup>

We disagree with DOSCO that it is entitled to a CEP offset merely based on case precedent. Whether DOSCO is entitled to a CEP offset is a fact-intensive and case-specific inquiry. In the cases cited by DOSCO, the Department found, based on record evidence, that the comparison market LOT was more advanced than the CEP LOT. Here, however, we find that the information provided by DOSCO in support of its claim does not demonstrate that there were significant differences between the selling functions performed for its home market sales and sales to DOSCO America. Therefore, we find that the record of this case is distinct from those cited by DOSCO. Counter to DOSCO's argument that the existence of a CEP affiliate merits a CEP offset, the Department has denied a CEP offset despite the existence of CEP affiliate.<sup>180</sup>

Finally, regarding DOSCO's assertion that we should consider its indirect selling expense ratios in our determination on this issue, consistent with the Department's determination in Shrimp from Thailand, we disagree. We note that in Shrimp from Thailand, we examined the indirect selling expense ratios only to substantiate the narrative of the respondent's selling functions.<sup>181</sup> Further, although differences in indirect selling expenses can be used as a reasonableness test on CEP offset claims, such differences are not dispositive.<sup>182</sup> In any event, while DOSCO's home

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<sup>179</sup> See 19 CFR 351.412(c)(2).

<sup>180</sup> See, e.g., Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, 77 FR 63291 (October 16, 2012), and accompanying Issues and Decision Memorandum at Comment 3.

<sup>181</sup> See Shrimp from Thailand, and accompanying Issues and Decision Memorandum at Comment 5 where we stated: "We disagree with the Rubicon Group's implication that we relied heavily on the reported value-based indirect selling expense ratios in denying the CEP offset. Rather, we considered the ratios in combination with the analysis of selling functions, in order to determine if the ratios substantiated the narrative explanation of selling functions, in accordance with our practice. See Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review, 62 FR 16759 (April 8, 1997), at 16760; and Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan: Final Results of Antidumping Duty Administrative Review, 67 FR 2408 (January 17, 2002), and accompanying Issues and Decision Memorandum (Hot-Rolled Steel from Japan) at Comment 1.

<sup>182</sup> See Hot-Rolled Steel from Japan and accompanying Issues and Decision Memorandum at Comment 1.

market indirect selling expenses may be larger in absolute terms than the corresponding U.S. indirect selling expenses in Korea, they are smaller as a percentage of home market price. Significantly, neither ratio is particularly large. Accordingly, looking to indirect selling expense ratios contributes nothing to our analysis.

Comment 8: Raw Material Costs for DOSCO

In the Preliminary Determination, we adjusted DOSCO's reported raw material costs for CONNUMs that were identical in all physical characteristics except painting to reflect the same hot-rolled coil cost.<sup>183</sup>

DOSCO argues that this adjustment was unnecessary and should not be made in the final determination. According to DOSCO, the reported costs are based on the company's normal books and records, and any differences in cost are not distortive but rather are attributable to production timing issues and product mix.<sup>184</sup> Specifically, DOSCO interprets the Department's preliminary adjustment as suggesting that steel costs should be identical for any painted and unpainted pipe pairings. DOSCO contends that such treatment is not consistent with its normal books and records. DOSCO explains that the direct material costs assigned to a given product can vary between production orders depending on numerous factors such as the input costs or product yields at the particular time when the product was produced. To support this assertion, DOSCO notes that hot-rolled coil prices were higher at the beginning of the POI; thus, DOSCO maintains that products produced at the beginning of the POI had higher raw material costs than those produced at the end of the POI. DOSCO contends that the Department's preliminary adjustment fails to take these production timing variations into account.<sup>185</sup>

Further, DOSCO asserts that the noted cost differences are a result of collapsing multiple products under the Department's CONNUMs, which reflect ranged rather than actual perimeters and wall thicknesses. As an example, DOSCO notes that code "2" for wall thickness ranges from 0.1875" to 0.25", or 4.76 mm to 6.35 mm. Thus, DOSCO surmises that the hot-rolled coil costs for two CONNUMs of wall thickness "2" that differ only depending on whether they are painted, could present notable cost differences if the product mix for one CONNUM has thicknesses in the low end of the range while the other has thicknesses in the high end of the range.<sup>186</sup> DOSCO notes that at the cost verification, it presented specific examples demonstrating that the reported coil cost differences between nearly identical CONNUMs were attributable to the timing of production and the mix of products falling under the CONNUMs. As such, DOSCO maintains that its cost reporting methodology is supported by record evidence and is reasonable, accurate, and non-distortive. Accordingly, DOSCO requests that the Department eliminate this adjustment in its final margin calculation.<sup>187</sup>

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<sup>183</sup> See Preliminary Determination, and accompanying Preliminary Decision Memorandum, at 14.

<sup>184</sup> See DOSCO brief at 49-52.

<sup>185</sup> Id., at 49-50.

<sup>186</sup> Id., at 50.

<sup>187</sup> Id., at 50-52.

The petitioners argue that the Department should continue to adjust DOSCO's raw material costs in the final determination because such cost-smoothing adjustments are in accordance with statutory and regulatory mandates, as well as agency practice. As support for this assertion, the petitioners reference section 773(f)(1)(a) of the Act where the Department is directed to use only data that "reasonably reflect the costs associated with the production and sale of merchandise." The petitioners also point out that 19 CFR 351.411(b) provides that "only differences in variable costs associated with the physical differences" should be considered. The petitioners contend that the Department frequently reallocates the costs reported by Korean pipe producers to smooth out cost differences unrelated to physical characteristics.<sup>188</sup>

The petitioners argue that, even though DOSCO's reported costs are based on its normal books and records which are in accordance with home country GAAP, the costs fail to comply with the Act's requirement to "reasonably reflect the costs associated with the production and sale of the merchandise." Thus, the petitioners conclude that DOSCO's explanations for the extreme cost swings are irrelevant if, as noted by the Department in the cost verification report, they create "distortive differences in the reported per-unit DIRMAT costs of nearly identical CONNUMs." Contrary to DOSCO's assertions, the petitioners opine that the Department's application of such reallocations does not suggest that costs should be identical, but rather only that, where there are extreme cost differences, they should be eliminated. Therefore, the petitioners request that the Department continue to reallocate DOSCO's raw material costs in the final determination.

#### Department's Position:

For the final determination, we continue to adjust DOSCO's reported raw material costs. Specifically, we adjusted DOSCO's reported costs for CONNUMs that have identical CONNUM physical characteristics, except for painting (i.e., steel input type, quality, metallic coating, perimeter, wall thickness, scarfing, and, shape) to reflect the same hot-rolled coil cost.

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

Accordingly, the Department is instructed to rely on a company's normal books and records if two conditions are met: 1) the books are kept in accordance with home country GAAP; and 2) the books reasonably reflect the cost to produce and sell the merchandise. Here, DOSCO's books meet the first criterion; thus, the question facing the Department is whether the per-unit costs from DOSCO's normal books reasonably reflect the cost to produce and sell the merchandise under consideration.

At the outset of a case, the Department identifies the physical characteristics that are the most significant in differentiating between products. These are the physical characteristics that define unique products, i.e., the CONNUMs, for sales comparison purposes. The level of detail within each physical characteristic (e.g., the multiple different sizes of a product) reflects the

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<sup>188</sup> See the petitioners' rebuttal brief, at 34.

importance that the Department places on establishing NVs based on the comparison market sales of identical, or the most similar, foreign like product. Thus, under sections 773(f)(1)(A) and 773(a)(6)(c)(ii) and (iii) of the Act, a respondent's reported product costs should reflect meaningful cost differences attributable to these different physical characteristics. This ensures that the product-specific costs we use for the sales-below-cost test, constructed value (CV), and the difference-in-merchandise (DIFMER) adjustment accurately reflect the distinct physical characteristics of the products whose sales prices are used in the Department's dumping calculations.

Under section 773(b)(1)(B) of the Act, the Department tests whether sales in the home market were made at prices which permit recovery of all costs within a reasonable time period. In doing so, the Department's normal practice is to use POI annual average costs to calculate the cost of production. The Department uses annual average costs in order to even out swings in the production costs experienced by the respondent over short periods of time. This way, we smooth out the effect of fluctuating raw material costs, erratic production levels, major repairs and maintenance, inefficient production runs, and seasonality.<sup>189</sup>

The physical characteristics identified in this case are steel input type, quality, metal coating, painting, perimeter, wall thickness, scarfing, and shape.<sup>190</sup> Based on our analysis of DOSCO's reported cost data, the Department continues to find that the large fluctuation in costs between CONNUMs cannot be explained by the physical characteristics of those CONNUMs.<sup>191</sup> Rather, the differences are linked to: 1) the fluctuation in coil prices during the POI; and 2) the range of product perimeters and thicknesses that fall within the same CONNUM.<sup>192</sup>

In its normal books, DOSCO calculates product-specific costs on a quarterly basis.<sup>193</sup> While DOSCO weight-averaged its POI periodic costs together to calculate the reported costs, the company produced and sold certain CONNUMs a limited number of times during the cost reporting period.<sup>194</sup> However, as pointed out by DOSCO, coil costs were higher at the beginning of the POI.<sup>195</sup> As a result, those products that were produced in more significant quantities at the beginning of the POI were burdened with the higher coil costs. Hence, the timing of the coil

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<sup>189</sup> See e.g., Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2011-2012, 79 FR 37284 (July 1, 2014) (Korean CWP), and accompanying Issues and Decision Memorandum at Comment 1; Stainless Steel Bar from the United Kingdom: Final Results of Antidumping Duty Administrative Review, 72 FR 43598 (August 6, 2007) (UK Bar), and accompanying Issues and Decision Memorandum at Comment 1; Certain Steel Concrete Reinforcing Bars from Turkey, Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 70 FR 67665, (November 8, 2005), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>190</sup> See, e.g., the Department's September 11, 2015, section B questionnaire at B-7 through B-10.

<sup>191</sup> See DOSCO Cost Verification Report, at 19.

<sup>192</sup> Id.

<sup>193</sup> Due to a change in accounting systems, DOSCO actually calculated costs for the following five periods during the POI: July 2014, August 2014, September to December 2014, January to March 2015, and April to June 2015. See DOSCO Cost Verification Report, at 5.

<sup>194</sup> Id., at 19 and verification exhibit 11.

<sup>195</sup> See DOSCO brief, at 49.

purchases and the timing of the pipe production are influencing the cost of the pipe rather than the pipe's physical characteristics.

With regard to the dimensional variations in the products that fall within a CONNUM, we agree with DOSCO that this is a factor contributing to the cost variations between nearly identical CONNUMs. However, as noted above, under sections 773(f)(1)(A) and 773(a)(6)(C)(ii) and (iii) of the Act, a respondent's reported product costs should reflect meaningful cost differences attributable to these different physical characteristics. This ensures that the product-specific costs we use for the sales-below-cost test, CV, and the DIFMER adjustment accurately reflect the distinct physical characteristics of the products whose sales prices are used in the Department's dumping calculations. Thus, when there are significant cost variations between nearly identical CONNUMs (e.g., the physical characteristics of two CONNUMs are exactly the same except one is painted and one is not), we find that this is a distortion that must be corrected.

DOSCO does not dispute these facts. Instead, these facts underpin DOSCO's argument for accepting the cost variances between CONNUMs that differ only in whether they have been painted or not. However, we disagree that such rationale supports that the reported costs are not distorted. Rather, we find that fluctuation in coil costs create distortive cost differences that are unrelated to the physical characteristics outlined by the Department.

The Department faced similar situations where a CONNUM's costs were highly dependent on either specific production runs or on the timing of the main raw material purchases under a cost allocation methodology that reflects a narrow population of the main raw material purchases (e.g., coil-specific, first in first out, monthly weight-averages, etc.) when allocating raw material costs to the products produced. For example, in UK Bar, the Department found that the respondent's costs from its normal books and records were distortive.<sup>196</sup> In that case, the respondent assigned a specific billet purchase price to each job order within a CONNUM, and because it produced and sold each product only a limited number of times during the cost reporting period, the specific billet costs did not represent the unit cost normally experienced by the company to produce the product during that time period. Similarly, in Korean CWP, the Department reallocated the respondent's costs from its normal books and records because the product-specific cost differences were related to timing differences rather than differences in physical characteristics.<sup>197</sup> In fact, the CIT upheld our reallocation of costs where a respondent's reported costs reflect cost differences due to factors other than physical characteristics.<sup>198</sup>

Based on the foregoing discussion, the Department finds that DOSCO's methodology results in arbitrary cost differences between nearly identical CONNUMs which are independent of the physical characteristics identified by the Department. Therefore, for the final determination we have continued to adjust DOSCO's reported costs for CONNUMs that are identical in all of the Department's physical characteristics except for painting (i.e., steel input type, quality, metallic coating, perimeter, wall thickness, scarfing, and, shape) to reflect the same hot-rolled coil cost.

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<sup>196</sup> See UK Bar, and accompanying Issues and Decision Memorandum at Comment 1.

<sup>197</sup> See Korean CWP, and accompanying Issues and Decision Memorandum at Comment 1.

<sup>198</sup> See Thai Plastic Bag Indus. Co., Ltd. v. United States, 751 F. Supp. 2d 1316, 1324-25 (CIT 2010).

### 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 the investigation and the final weighted-average dumping margins in the Federal Register.

  
\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree

  
\_\_\_\_\_  
Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

14 July 2016  
\_\_\_\_\_  
(Date)