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Investigation
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February 27, 2017

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Senior Director, Office I
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative
Determination in the Less-Than-Fair-Value Investigation of
Phosphor Copper from the Republic of Korea

I. Summary

The Department of Commerce (the Department) determines that phosphor copper from the Republic of Korea (Korea) is being, or is likely to be, sold in the United States at less-than-fair-value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). We analyzed the case brief submitted by Petitioner¹ and the rebuttal brief submitted by respondent² for the final determination in this LTFV Investigation. Based on our analyses of the comments received from interested parties, this final determination differs from the *Preliminary Determination*³ with respect to the final weighted-average dumping margins calculated for Bongsan and all others. We recommend that you approve the positions set forth in the “Analysis of Comments” section of this memorandum.

II. Background

On October 14, 2016, the Department published the *Preliminary Determination* in its LTFV investigation of phosphor copper from Korea in the *Federal Register*.⁴ On October 25, 2016,

¹ Petitioner is Metallurgical Products Company.

² The mandatory respondent in this investigation is Bongsan Co., Ltd. (Bongsan).

³ See *Phosphor Copper from the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances*, 81 FR 71049 (October 14, 2016) (*Preliminary Determination*), and accompanying Issues and Decision Memorandum (Preliminary Decision Memorandum).

⁴ See *Preliminary Determination*, 81 FR 71049.



Petitioner submitted pre-verification comments concerning Bongsan.⁵ The Department conducted export price (EP) and home market sales, and cost verifications of Bongsan from November 9, 2016, through November 18, 2016. We released the Sales Verification Report and Cost Verification Report for Bongsan on December 8, 2016, and December 19, 2016, respectively.⁶

We invited parties to comment on our *Preliminary Determination*. On December 28, 2016, Petitioner submitted its case brief.⁷ On January 3, 2017, Bongsan submitted its rebuttal brief.⁸

Petitioner requested that the Department conduct a hearing in this investigation, which the Department conducted on January 25, 2017.⁹

III. Period of Investigation

Pursuant to 19 CFR 351.204(b)(1), the Department established the period of investigation (POI) as January 1, 2015, through December 31, 2015, the four most recently completed fiscal quarters as of the month preceding the month in which the petition was filed, which was March 2016.

IV. Postponement of Final Determination

On October 12 and 19, 2016, Bongsan, the sole mandatory respondent in this investigation, requested that the Department fully extend the deadline for the final determination and extend the application of the provisional measures from a four-month period to a period of not more than six months.¹⁰ In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), the Department determined to postpone the final determination until no later than 135 days after the date of the publication of the *Preliminary Determination* and extend the provisional measures from a four-month period to a period of not more than six months. Because the 135-day deadline falls on Sunday, February 26, 2017, pursuant to the "*Next Business*

⁵ See Petitioner's submission titled "Phosphor Copper from South Korea: Petitioner's Pre-Verification Comments on Bongsan" dated October 25, 2016.

⁶ See Memorandum to the File, "Less Than Fair Value Investigation of Phosphor Copper from the Republic of Korea: Verification of the Sales Responses of Bongsan Co., Ltd.," dated December 8, 2016 (Sales Verification Report); *see also* Memorandum to the File, "Verification of the Cost Response of Bongsan in the Antidumping Duty Investigation of Phosphor Copper from Republic of Korea," dated December 19, 2016 (Cost Verification Report).

⁷ See Petitioner's letter dated December 27, 2016 (Case Brief).

⁸ See Bongsan's letter dated January 3, 2017 (Rebuttal Brief).

⁹ See Petitioner's letter dated November 14, 2016; *see also* Hearing Transcript, filed on the record February 6, 2017.

¹⁰ See Bongsan's letter titled "Phosphor Copper from the Republic of Korea: Request for Extension of Final Determination Deadline," dated October 12, 2016; *see also* Bongsan's letter titled, "Phosphor Copper from the Republic of Korea: Amended Request for Extension of Final Determination Deadline," dated October 19, 2016.

Day" Rule for Administrative Determination Deadlines,¹¹ the final determination for this investigation is due on February 27, 2017.¹²

V. Scope of the Investigation

The merchandise covered by this investigation is master alloys¹³ of copper containing between five percent and 17 percent phosphorus by nominal weight, regardless of form (including but not limited to shot, pellet, waffle, ingot, or nugget), and regardless of size or weight. Subject merchandise consists predominantly of copper (by weight), and may contain other elements, including but not limited to iron (Fe), lead (Pb), or tin (Sn), in small amounts (up to one percent by nominal weight). Phosphor copper is frequently produced to JIS H2501 and ASTM B-644, Alloy 3A standards or higher; however, merchandise covered by this investigation includes all phosphor copper, regardless of whether the merchandise meets, fails to meet, or exceeds these standards.

Merchandise covered by this investigation is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheading 7405.00.1000. This HTSUS subheading is provided for convenience and customs purposes; the written description of the scope of this investigation is dispositive.

VI. Final Negative Determination of Critical Circumstances

On July 27, 2016, Petitioner alleged that critical circumstances exist with regard to Bongsan under sections 771(e)(1)(A) and (B) of the Act.¹⁴ In the *Preliminary Determination*, we found that the record did not support an affirmative finding of critical circumstances under section 771(e)(1)(A) of the Act. Specifically, we found that the criteria under section 733(e)(1)(A)(i) of the Act – being that there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise – was not met. We further found that the criteria under section 733(e)(1)(A)(ii) of the Act was not met because Bongsan's margin did not exceed the quantitative thresholds necessary to demonstrate that the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at LTFV, and that there was likely to be material injury by reason of such sales.¹⁵

¹¹ Postponing the final determination to 135 days after the publication of the *Preliminary Determination* would place the deadline on Sunday, February 26, 2017. The Department's practice dictates that where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. See *Notice of Clarification: Application of "Next Business Day" Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended*, 70 FR 24533 (May 10, 2005).

¹² See *Phosphor Copper from the Republic of Korea: Postponement of Final Determination of Sales at Less Than Fair Value*, 81 FR 71049 (October 27, 2016).

¹³ A "master alloy" is a base metal, such as copper, to which a relatively high percentage of one or two other elements is added.

¹⁴ See Petitioner's letter titled "Phosphor Copper from the Republic of Korea: Petitioner's Critical Circumstances Allegation," dated July 27, 2016.

¹⁵ See Preliminary Decision Memorandum at 6-8.

Concerning section 733(e)(1)(A)(i) of the Act, we continue to find that there is no evidence on the record indicating that there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of subject merchandise. Concerning section 733(e)(1)(A)(ii) of the Act, we continue to find that Bongsan's margin is below the margin thresholds the Department normally considers (25 percent or more for EP sales or 15 percent or more for constructed export (CEP) sales) sufficient to impute knowledge of dumping.¹⁶ We, therefore, continue to find that critical circumstances do not exist with regard to Bongsan.¹⁷

Likewise, for all other producers or exporters of phosphor copper from Korea, the Department finds that the criteria under sections 733(e)(1)(A)(i) and (ii) of the Act have not been met. Accordingly, the Department determines that critical circumstances do not exist for all other producers or exporters of phosphor copper from Korea.

VII. List of Comments

- Comment 1: Whether the Department Should Adjust Bongsan's General and Administrative Expense Ratio to Exclude Items Related to Prior Periods
- Comment 2: Whether the Department Should Recalculate Bongsan's Financial Expense Ratio to Account for Gains and Losses on Certain Derivative Transactions
- Comment 3: Date of Sale for Certain U.S. Customer
- Comment 4: Duty Drawback
- Comment 5: Ministerial Error Regarding U.S. Billing Adjustments
- Comment 6: Revision to Indirect Selling Expense Ratios

VIII. Discussion of Comments

Comment 1: Whether the Department Should Adjust Bongsan's General and Administrative (G&A) Expense Ratio to Exclude Items Related to Prior Periods

Background

Bongsan claimed an offset to its G&A expenses for "Miscellaneous Income" with regard to a refund of a penalty that Bongsan paid due to an alleged underpayment of value-added taxes (VAT) in 2014.¹⁸ The Department adjusted Bongsan's G&A ratio in the *Preliminary Determination* for a portion of these claimed VAT penalty refunds.¹⁹ Bongsan also claimed

¹⁶ See, e.g., *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17416 (March 26, 2012). The margin calculated for Bongsan in this final determination is 8.43 percent.

¹⁷ We further note that because the criteria under section 733(e)(1)(A) of the Act are not met, it is not necessary for the Department to examine whether imports of subject merchandise from Bongsan were "massive" during the comparison period, as described under section 733(e)(1)(B) of the Act.

¹⁸ See Bongsan's first supplemental section D questionnaire response (1SQR-D), dated August 30, 2016, at 6 and Exhibit SD-10; see also Cost Verification Report at 15.

¹⁹ See Memorandum from Gina Lee, Senior Accountant, through Ernest Gziryan, Lead Accountant, to Neal Halper, Director, titled "Antidumping Duty Investigation of Phosphor Copper from the Republic of Korea: Cost of

offsets to its G&A expenses for “Gains on Prior Period Adjustments” in relation to a revision of an error in a prior period.²⁰

Petitioner’s Arguments

- Under its normal practice, the Department will allow offsets to G&A expenses for income items that relate to the relevant year, but will not typically allow offsets to current year expenses for adjustments associated with prior years.²¹ Whether such adjustments are reported in accordance with Generally Accepted Accounting Principles (GAAP) is of no consequence.²²
- Following its normal practice, the Department should not allow an offset to Bongsan’s G&A expense ratio that it claimed for “Gains on Prior Period Adjustments.”²³
- In calculating its G&A expense ratio, Bongsan claimed an offset for “Miscellaneous Income,” which the company said included a refund from the Korean tax authority for a VAT penalty.²⁴
- The Department should exclude all income and expenses relating to prior period VAT payments for two reasons.
- First, the income and expenses at issue are refunds for VAT payments, and it is the Department’s normal practice to exclude VAT from the G&A expense calculation.²⁵

Production and Constructed Value Calculation Adjustments for the Preliminary Determination – Bongsan Co., Ltd.” (Preliminary Determination Cost Memo), dated October 5, 2016, at 2.

²⁰ See Bongsan’s Initial Questionnaire responses to section A, dated May 19, 2016 (Bongsan’s IQR-A) at Exhibit A-12 at 11; *see also* Cost Verification Report at 15.

²¹ See Petitioner’s Case Brief at 5, citing *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review (Certain Pasta from Italy)*; 2013-2014, 81 FR 8043 (February 17, 2016), and accompanying Issues and Decision Memorandum at 7; *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 FR 55782 (August 30, 2002), and accompanying Issues and Decision Memorandum at 19 (the Department excluded from the G&A expense calculation non-operating items related to a prior period pension adjustment because it was “not related to period costs for the current year”); *Notice of Final Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Brazil*, 70 FR 7243 (February 11, 2005) (*Pressure Pipe from Brazil*) and accompanying Issues and Decision Memorandum at 16 (“In this case, because the correction does not relate to expenses incurred during the POR, it is not appropriate to reduce the current period’s costs to correct an error made in the depreciation expense recognized in prior periods.”); and *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan (Hot-Rolled from Japan)*, 64 FR 24329 (May 6, 1999) (“We agree with the petitioners that an offset to G&A expense for a reversal of a reserve for repairs of the blast furnace should be disallowed. It has been the Department’s practice to disallow reductions to current year production costs by the reversal of prior year operating expense accruals.”).

²² *Id.*, at 7, citing *Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review*, 74 FR 6365 (February 9, 2009) (*Steel Sheet and Strip in Coils from Mexico*), and accompanying Issues and Decision Memorandum at 25-26; and *Hot-Rolled from Japan*, 64 FR 24349, 24350 (May 6, 1999).

²³ *Id.*, at 7-8.

²⁴ *Id.*, at 8, citing Bongsan’s ISQR-D at 6 and Exhibit SD-10.

²⁵ *Id.*, at 9, citing *Ferrosilicon from Venezuela: Final Determination of Sales at Less Than Fair Value*, 79 FR 44397 (July 31, 2014), and accompanying Issues and Decision memorandum at 7 (“We agree with Petitioners and have revised FerroVen’s G&A expense ratio to exclude the VAT and duty drawback credits and the interest income for late payments of those credits. This is consistent with our past practice as noted by Petitioners.”); *Notice of Final Determination of Sales at Less Than Fair Value: Citric Acid and Certain Citrate Salts from Canada*, 74 FR 16843

- Second, the Department found at verification that the VAT-related income and expenses all related to VAT penalties from 2014, and it is the Department's practice to exclude income and expense items that relate to prior years in the G&A expense calculation.²⁶
- In *Certain Pasta from Italy*, a respondent argued that the Department should adjust its G&A expense ratio for the corrections to prior period adjustments; however the Department determined that the adjustments in the prior period were not normal recurring provisions and, therefore, the Department excluded the prior period adjustment.²⁷
- In *Pressure Pipe from Brazil*, the Department did not include the reversal of a depreciation expense that related to a prior period in the G&A expense calculation because the expense did not relate to expenses incurred during the period of review (POR).²⁸
- Bongsan included an offset to its G&A expense ratio for "Gains on Prior Period Adjustments," which the company explained as a revision of an error from a previous period.²⁹ The Department has excluded this type of adjustment to G&A expense in prior cases.³⁰

Bongsan's Rebuttal Arguments

- It is normal and reasonable to account for adjustments such as fines and penalties or refunds of fines and penalties in the period in which they are incurred. Over time, expenses and revenues related to such events will net out, and attempting to attribute these adjustments retroactively with *ad hoc* adjustments is potentially distortive because current periods cannot be adjusted for future expenses or revenues.³¹
- Petitioner mischaracterizes the refunds as "for VAT payments" when, in fact, as clarified at verification, the payments were refunds of penalties. The refunds are not taxes themselves, but rather fees that Bongsan paid which were refunded and are associated with Bongsan's business operations.³²
- The Department does not necessarily exclude revenues or expenses from G&A simply because they are connected to a prior period. For example, in the 2011-12 antidumping duty administrative review of *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, the Department included litigation accrual expenses related to prior periods in the G&A ratio because they were "relate[d] to the general operations of the company as a whole, as opposed to including only those expenses that directly relate to the production

(April 13, 2009), and accompanying Issues and Decision Memorandum at 20 ("Normally, with the exception of VAT and income taxes, the Department usually includes taxes, such as land or property taxes, in the calculation of COP."); *Frontseating Service Valves from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 74 FR 10886 (March 13, 2009) and accompanying Issues and Decision Memorandum at 10.

²⁶ See Cost Verification Memo at 2 and 15.

²⁷ See Petitioner's Case Brief at 6, citing *Pasta from Italy* and accompanying Issues and Decision Memorandum at Comment 2.

²⁸ *Id.*, citing *Pressure Pipe from Brazil* and accompanying Issues and Decision Memorandum at Comment 8.

²⁹ See Bongsan's IQR-A at Exhibit A-12 at 11; see also Cost Verification Report at 15.

³⁰ See Petitioner's Case Brief at 8.

³¹ See Bongsan's Rebuttal Brief at 4.

³² *Id.*; see also Cost Verification Report at 2 and 15.

of the merchandise under consideration.”³³ In the final determination of *Welded Line Pipe from the Republic of Turkey*, the Department included prior period expenses related to accrued depreciation because “these expenses are related to general operations in the current year” and are consistent with GAAP.³⁴

- During verification, the Department did not note any discrepancies in Bongsan’s inclusion of gains on prior period adjustments in G&A. The Department clarified that the “refund of Korean taxes” was more accurately described as a “refund of a penalty” that Bongsan had paid due to an alleged underpayment of VAT in 2014.³⁵ Nevertheless, the Department commented that Bongsan’s inclusion of this income in G&A might be improper and that such items could be disallowed because “they related to a prior period and also relate to VAT taxes.”³⁶
- The adjustment for refunded penalties should be applied to the period in which Bongsan received the refund because the VAT inquiry related to a raw material supplier and is, thus, related to Bongsan’s normal business operations and to the production of subject merchandise during the POI.³⁷

Department’s Position: With regard to Petitioner’s argument that the Department should disallow the offset to G&A expenses for refunds (proceeds) from the Korean tax authority for penalties related to VAT, we agree. The Department’s established practice in calculating the G&A expense rate is to not include income items as an offset to G&A that are associated with non-recurring provisions from prior years, but include only income items that relate to the current period.³⁸ The penalties were primarily paid in 2014, but after Bongsan’s successful appeal to the tax authority, they were reversed in the POI, and income from the refund was recorded during the POI. While the penalties paid, and their refund, were recorded in different periods, they relate to the same occurrence, *i.e.*, the assessment of penalties in 2014. This penalty refund can be treated in a manner similar to how the Department treats insurance claim settlements that are often paid out in years after the loss but are incurred in the same initial period. In those instances, the Department normally allows an offset for insurance reimbursements up to the amount of the related losses incurred during the same reporting period.³⁹ In the instant case, we found at verification that the VAT penalty refunds received

³³ See Bongsan’s Rebuttal Brief at 4, citing *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) (*Circular Welded Non-Alloy Steel Pipe from Korea*) and accompanying Issues and Decision Memorandum at Comment 4.

³⁴ *Id.*, at 4-5, citing *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 Comment 11.

³⁵ See Bongsan’s Rebuttal Brief at 3, referencing Cost Verification Report at 2 and 15.

³⁶ See Cost Verification Report at 2.

³⁷ See Bongsan’s Rebuttal Brief at 5.

³⁸ See *Certain Pasta from Italy*; see also *Pressure Pipe from Brazil*.

³⁹ See, e.g., *Final Results of the Antidumping Duty Administrative Review of Certain Softwood Lumber Products from Canada*, 70 FR 73437 (December 12, 2005), and accompanying Issues and Decision Memorandum at Comment 40 (where the Department found that it was inappropriate to allow insurance proceeds received during the POR that related to losses incurred in prior years to offset the cost of production (COP) of the POR); and see *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52741 (September 5, 2003), and accompanying Issues and Decision Memorandum at Comment 19

during the POI were related to losses incurred and expensed prior to the POI.⁴⁰ Therefore, consistent with the Department's practice regarding proceeds received in the POI which related to losses incurred and expensed prior to the POI, we have disallowed Bongsan's claimed offset for these VAT penalty refunds, except to the extent it reflected expenses recognized during the POI.⁴¹ We note that Petitioner's argument that this income item should be excluded because the Department's normal practice is to exclude VAT from the G&A expense calculation is not on point, as this amount represents penalties paid, rather than a VAT expense. We disagree with Petitioner's argument that it is of no consequence whether the questioned expenses are recorded in accordance with GAAP. In both cases that Petitioner has cited, we acknowledge that the expenses are normally recorded in accordance with GAAP. We are only adjusting those expenses due to our practice of calculating the G&A expense rate to include only expense and income items that relate to the current period.⁴² As we have often stated, under section 773(f)(1)(A) of the Act, the Department must rely on the costs as recorded in the normal books and records of the producer so long as those records are kept in accordance with GAAP of the exporting country, unless those costs do not reasonably reflect the cost of producing the merchandise.⁴³

We also agree with the Petitioner that the Department should disallow the offset to Bongsan's G&A expense ratio for the gains on prior period adjustments. In Bongsan's financial statements, it shows that there was a correction of an error related to an understatement of inventory for the prior year. This correction resulted in a non-operating gain in 2015, which Bongsan included in its G&A expense ratio calculation.⁴⁴ It is the Department's normal practice to include write-downs of raw material and work-in-process (WIP) inventory in cost of production (COP) only when the inventory is actually written down.⁴⁵ However, for finished goods inventory, we do not normally include write-downs in the COP, as the write-down is more closely associated with the sales of the merchandise versus the cost to produce it.⁴⁶ As the respondent has not clearly established whether the correction related to raw materials, WIP or finished goods inventory, it has failed to justify the appropriateness of including the inventory error correction in the G&A

(where the Department found that crop insurance proceeds received outside the POR were not related to the COP for the POR).

⁴⁰ See Cos Verification Report at pages 2 and 15.

⁴¹ See Memorandum to Neal Halper from Gina Lee, titled "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Bongsan Co., Ltd.," (Final Cost Calculation Memo) dated concurrently with this memorandum.

⁴² See *Steel Sheet and Strip in Coils from Mexico* and accompanying Issues and Decision Memorandum at Comment 7; *Hot-Rolled from Japan*, 64 FR at 24350.

⁴³ See *Steel Sheet and Strip in Coils from Mexico* and accompanying Issues and Decision Memorandum at Comment 6.

⁴⁴ See Exhibit A-12 from Bongsan's section A response, at 11, n.20.

⁴⁵ See, e.g., *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Taiwan*, 65 FR 34658 (May 31, 2000), and accompanying Issues and Decision Memorandum at Comment 8 (where we stated, "CSC's claim that the Department's treatment will ultimately result in double-counting these costs is unsupported. These costs will only be included in the income statement one time. When the items are used in production, they will be recorded at the lower values to which they were adjusted.").

⁴⁶ See, e.g., *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 FR 19153 (April 12, 2004), and accompanying Issues and Decision Memorandum at Comment 7.

ratio calculation.⁴⁷ Furthermore, this gain relates to inventory valuation errors from prior years. We do not consider it appropriate to reduce the current year's costs by the correction of prior year's understated assets or overstated costs. As a result of all of the above factors, we have excluded the gain related to the inventory error correction from reported costs for the final determination.

We find Bongsan's reference to *Welded Line Pipe from Turkey* inapposite. That case addressed recognition of accrued expenses in the current year, even though the actual outlay of funds would not occur until future years. In that case, the Department explained that, even though the underlying events leading to the accrual of the expenses took place prior to the POI, under Turkish GAAP, the accruals were recognized and recorded as current expenses for the first time in the current audited financial statements. Therefore, the Department adhered to its consistent practice to follow the financial statement treatment of costs and include such costs as current year G&A expenses.⁴⁸ The same reasoning applies to Bongsan's reference to *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*.⁴⁹ In that instance, even though the underlying events that led to the accrual of the penalties took place prior to the POR, the expenses were related to general operations in the POR. Under Korean GAAP, the litigation accrual expenses were recognized and recorded as current expenses for the first time in the POR audited financial statements when they became probable and reasonably estimable. There, the Department followed its consistent practice and included the costs as current year expenses. In Bongsan's case, in addition to the fact that the items at issue relate to errors in prior years, rather than current year accruals, the respondent failed to justify the appropriateness of including the inventory error correction in the G&A ratio calculation.

Comment 2: Whether the Department Should Recalculate Bongsan's Financial Expense Ratio to Account for Gains and Losses on Certain Derivative Transactions

Petitioner's Arguments

- Bongsan submitted a calculation of its interest expense ratio;⁵⁰ however other information provided by Bongsan indicates that the company excluded "Gains on Derivative Transactions" and "Losses on Derivatives Transactions" from its interest expense ratio calculation because Bongsan stated the amounts related to investment activities.⁵¹

⁴⁷ See, e.g., *Certain Steel Nails from Taiwan: Final Determination of Sales at Less Than Fair Value*, 80 FR 28959 (May 20, 2015), and accompanying Issues and Decision Memorandum at Comment 15 (where the Department disallowed an adjustment for an overstatement of inventory costs because the nature of the error was not known).

⁴⁸ See *Welded Line Pipe from Turkey* and accompanying Issues and Decision Memorandum at Comment 11, referencing *Circular Welded Non-Alloy Steel Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 4; and *Cut-to-Length Carbon Steel Plate from Romania: Final Results of Antidumping Duty Administrative Review and Final Partial Rescission*, 72 FR 6522 (February 12, 2007), and accompanying Issues and Decision Memorandum at Comment 3.

⁴⁹ See *Circular Welded Non-Alloy Steel Pipe from Korea*, and accompanying Issues and Decision Memorandum at Comment 4.

⁵⁰ See Petitioner's Case Brief at 10, referencing Bongsan's section BCD initial questionnaire response (IQR-BCD), dated June 20, 2016, at D-21 and Exhibit D-12.

⁵¹ See Petitioner's Case Brief at 10, referencing Bongsan's IQR-BCD at Exhibit D-11 and Cost Verification Report at 15.

- The Department should recalculate Bongsan’s financial expense ratio to include gains and losses on derivative transactions. Bongsan’s derivative transactions relate to the company’s net financing activity and overall cash management, and should accordingly be included in the interest expense ratio.⁵² The Department typically includes foreign exchange gains and losses, interest, and currency swap gains and losses in the financial expense ratio calculation because such items relate to a company’s overall cash management.⁵³ The Department distinguishes these types of gains and losses from gains and losses associated with investment activities, which are generally excluded from the cost of production calculation.⁵⁴
- If the Department chooses not to include the gains and losses from Bongsan’s derivative transactions as part of the financial expense calculation, such gains and losses should be included in the G&A expense ratio as they relate to the overall operations of the company.

Bongsan’s Rebuttal Arguments

- Bongsan does not dispute that “foreign exchange gains and losses and similar items” should be included in financial expenses; however, Bongsan’s gains and losses on derivative transactions are in no way comparable to “foreign exchange gains and losses and similar items.”
- Petitioner references *Orange Juice from Brazil*, in which the Department stated that it normally considers gains and losses related to foreign exchange and currency hedging operations to be part of financial expenses,⁵⁵ and *CORE from Korea*, where the Department determined that certain items, such as interest rate swaps, currency swaps, and currency future swaps (but not derivative gains), should be included in financial expenses because they “relate to a company’s overall cash management.”⁵⁶ Neither of these cases establishes that the Department normally includes derivative gains or losses in determining net financing expenses. The only “similar items” that Petitioner references in the Department’s practice are “interest” and “currency swap gains and losses.” Petitioner provides no argument or evidence that such items, to the extent incurred by Bongsan, were excluded from the financial expense ratio.
- Bongsan correctly reported its interest income and expenses and foreign currency gains and losses as non-operating items, and the Department reviewed and tested them at the Cost Verification.⁵⁷

⁵² See Petitioner’s Case Brief at 11-12.

⁵³ *Id.*, at 11, citing *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination (Orange Juice from Brazil)*, 77 FR 63291 (October 16, 2012) and accompanying Issues and Decision Memorandum at Comment 10; and *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 76 FR 15291 (March 21, 2011) (*CORE from Korea*) and accompanying Issues and Decision Memorandum at Comment 19.

⁵⁴ *Id.*

⁵⁵ See Bongsan’s Rebuttal Brief at 6, citing *Orange Juice from Brazil*.

⁵⁶ *Id.*, citing *CORE from Korea*.

⁵⁷ See Bongsan’s Rebuttal Brief at 7, referencing Cost Verification Report at 15.

- At the Cost Verification, the Department did not note the exclusion of gains or losses on derivatives as a discrepancy.⁵⁸
- Petitioner references *Cold-Rolled Steel from Russia*, which stands for the proposition that a company's investments relate to "a separate profit making activity," whereas foreign exchange gains and losses relate to the company's cash management and foreign currency exposure.⁵⁹ Petitioner incorrectly conflates Bongsan's investments activities with its exchange rate gains and losses.
- Bongsan's investments in derivatives are entirely unconnected to its production operations. The record does not indicate that such derivatives are related in any way to either raw material purchases or sales, or that derivative investments were made to manage risk associated with phosphor copper operations.⁶⁰ Bongsan's foreign currency losses or gains that related to transactions were recorded in Bongsan's income statement, and therefore they have already been reported in the financial expense ratio.⁶¹
- It is the Department's longstanding policy to exclude from financial expenses any losses or gains related to investment activity "because they do not relate to the general operations of the company..." and because, "in calculating the COP and {constructed value} CV, (the Department) seeks to capture COP of the foreign like product and subject merchandise, and to exclude the cost of investment activities."⁶²

Department's Position: For the final determination, we have disallowed Bongsan's exclusion of gains and losses on derivative transactions from its costs of production for reporting purposes. As noted in cases cited by Petitioner, it is the Department's practice to include foreign exchange gains and losses and currency swap gains and losses in the financial expense rate calculation because such items relate to a company's overall cash management.⁶³ While we agree with Bongsan that neither of these cases establishes that the Department has included derivative gains or losses in determining net financing expenses, we find, as discussed below, that gains and losses on derivatives at issue in this case should be included in Bongsan's financial expenses.

In its normal books and records, Bongsan incurs gains and losses on derivative transactions.⁶⁴ Bongsan uses copper as the main input in producing the merchandise under consideration.⁶⁵ Copper is a commodity metal traded on the London Metal Exchange (LME), and prices for this

⁵⁸ *Id.*, referencing Cost Verification Report at 15-16.

⁵⁹ *Id.*, referencing *Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 49950 (July 29, 2016) (*CRS from Russia*), and accompanying Issues and Decision Memorandum at Comment 6.

⁶⁰ *Id.*

⁶¹ *Id.*, at 7-8.

⁶² *Id.*, at 8, citing *Certain Hot-Rolled Steel Flat Products from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 81 FR 53428 (August 12, 2016) (*Hot-Rolled from Turkey*), and accompanying Issues and Decision Memorandum at Comment 8.

⁶³ See *Orange Juice from Brazil; CORE from Korea*.

⁶⁴ See Cost Verification Report at 15-17.

⁶⁵ See letter from Petitioner's titled, "Phosphor Copper from South Korea: Petitioner's Comments on Product Characteristics," dated April 21, 2016, at 1-3; see also letter from Petitioner titled, "Phosphor Copper from South Korea: Petitioner's Response to the Department's Product Characteristics Questionnaire at on Product Characteristics," dated May 11, 2016, at 2-3.

type of metal fluctuate daily.⁶⁶ Because of the risk associated with the fluctuating metal prices, it is not unexpected that the company would engage in hedging mechanisms to protect itself from the risk associated with raw material input cost changes throughout the POI. To disregard Bongsan's metal cost management mechanisms in its normal operations would lead to distortions, because we would be ignoring the fact that Bongsan proactively attempts to diminish risks related to the volatility in the price of inputs used in its general operations.⁶⁷

Although the record does not provide any additional details of the underlying commodities and currency instruments which produced the gains and losses on the derivative transactions, we find that it is reasonable to include the full amount of such gains and losses in Bongsan's financial expense rate calculations. It is the Department's practice to exclude only investment-related gains or losses from the calculation of COP.⁶⁸ We disagree with Bongsan's contention that the derivatives at issue represent investment activity and that the losses on the derivative transactions are in no way comparable to "foreign exchange gains and losses and similar items." Investment activities are a separate profit making activity not related to the company's normal operations, whereas, the cost management mechanisms practiced by Bongsan by way of these particular derivative transactions are reasonably associated with the company's cash management and how the entity as a whole manages its primary raw material input price exposure.⁶⁹ For the foregoing reasons, we agree with Petitioner that Bongsan's derivative transactions at issue are part of the company's overall net financing activity, and we have added the gains and losses on derivative transactions to Bongsan's financial expense rate calculation for the final determination.⁷⁰

Comment 3: Date of Sale for a Certain U.S. Customer

Petitioner's Arguments

- For Bongsan's sales to a particular U.S. customer (hereinafter referred to as "Company A"), the Department should use an alternative date, other than the invoice date or shipment date, as the date of sale.
- The Department will normally use the date of invoice as the date of sale, as directed by 19 CFR 351.401(i); however, the Department is not required to use the invoice date where the record supports the use of an alternative date.⁷¹ As explained in the *Preamble* to its regulations, the Department may use an alternative date as the date of sale if there is

⁶⁶ See Exhibit D-1 of the Bongsan's section D questionnaire response (IQR-D), dated June 20, 2016, which includes a graph indicating the fluctuations in copper prices in 2015.

⁶⁷ See *Brass Sheet and Strip from Germany: Amended Final Results of Antidumping Duty Administrative Review*, 75 FR 66347 (October 28, 2010), and accompanying Issues and Decision Memorandum at Comment 1.

⁶⁸ See *CRS from Russia* and accompanying Issues and Decision Memorandum at Comment 6 and *Hot-Rolled from Turkey* at Comment 8.

⁶⁹ See *CRS from Russia* at Comment 6.

⁷⁰ See *CORE from Korea* and accompanying Issues and Decision Memorandum at 45; see also Memorandum from Gina Lee to Neal Halper, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Bongsan Co., Ltd.," dated concurrently with this memorandum at adjustment 3.

⁷¹ See 19 CFR 351.401(i); see also Petitioner's Case Brief at 13.

“satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice.”⁷²

- The Department has further explained that a date other than the invoice date may be used if the record “show[s] that the material terms of sale did not change or were not subject to change between this date and the invoice date.”⁷³ In *Carbon-Quality Steel Plate Products From Italy*, for example, the Department relied on the purchase-order confirmation date for the date of sale because the material terms of sale are established on the purchase order date.⁷⁴ Further, there were no changes to the material terms of sale between the purchase-order confirmation and the invoice date, noting that the quantity and value agreed to in the purchase-order confirmation matched the invoiced quantity and value.⁷⁵
- In the *Preliminary Determination*, the Department relied on the date of the commercial invoice as the date of sale for Bongsan’s U.S. sales; however, information revealed at verification demonstrates that the material terms of sales to Company A were set prior to the invoice date.⁷⁶ A review of the record also confirms that the material terms of sales are established before the invoice date. Therefore, the date of sale for Company A should be the date on which the material terms of sales are established (hereinafter referred to as “Alternative Sale Date”).⁷⁷
- The Department did identify one minor revision in the price for a sale to Company A after the sales invoice date;⁷⁸ however, it was the result of an “incorrect price quote” by Company A.⁷⁹ Therefore, the change in price related to an error in the original documentation and not to any change in the terms of sale as a result of additional negotiation between the buyer and seller.
- Because the Alternative Sale Date is not on the record for some of Bongsan’s sales to Company A,⁸⁰ the Department should rely on the information available on the record to determine an average lead time between the Alternative Sale Date and the invoice date for those sales without an Alternative Sale Date.⁸¹ Specifically, the Department should calculate a proxy Alternative Sale Date for the unselected and unverified sales by deducting the calculated average lead time from the respective invoice date, and use it as the date of sale.⁸²

⁷² See Petitioner’s Case Brief at 13, referencing *Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296, 27349 (May 19, 1997) (*Preamble*).

⁷³ *Id.*, citing *Certain Cut-to-Length Carbon-Quality Steel Plate Products from Italy: Final Results of Antidumping Administrative Review*, 75 FR 47777 (August 9, 2010) (*Carbon-Quality Steel Plate Products from Italy*), and accompanying Issues and Decision Memorandum at Comment 5.

⁷⁴ See *Carbon-Quality Steel Plate Products from Italy* and accompanying Issues and Decision Memorandum at Comment 5; see also Petitioner’s Case Brief at 14.

⁷⁵ *Id.*

⁷⁶ Petitioner refers to several sales that were selected and verified by the Department during the sales verification. See Petitioner’s Case Brief at 14-15; see also Sales Verification Report at 9-11.

⁷⁷ *Id.*

⁷⁸ See Petitioner’s Case Brief at 15. Petitioner incorrectly states that the incorrect price quote was revised after the sales invoice date when in fact the incorrect price quote was revised after the purchase order date. See Sales Verification Report at 10, 16-17.

⁷⁹ See Sales Verification Report at 16-17.

⁸⁰ Petitioner refers to the sales which were not selected for individual examination during the Department’s sales verification. See Petitioner’s Case Brief at 14-15; see also Sales Verification Report at 9-11.

⁸¹ See Petitioner’s Case Brief at 16, referencing section 776(a) of the Act.

⁸² *Id.*

- Furthermore, the Department's verification data indicates that Bongsan made sales to Company A in the month immediately after the POI (*i.e.*, in January 2016).⁸³ Based on the average lead time calculated as described above, it appears that the terms of sale for these transactions were set during the POI, and, therefore, they should be included in the calculation of Bongsan's dumping margin.⁸⁴
- In its original questionnaire, the Department explained that the date of sale should correspond with the date on which the material terms of sale are established. Bongsan responded that it was using the date of shipment as the date of sale and that "{p}rices and quantities may remain subject to change until the subject merchandise is actually shipped."
- By reporting its sales to Company A based on the shipment date rather than the Alternative Sale Date, Bongsan failed to fully cooperate with the Department's request for information to the best of its ability, and the Department does not have all the information on the record needed to calculate dumping margins for these sales. Accordingly, the Department should rely on adverse facts available pursuant to section 776(a) of the Act as this standard includes not only "intentional conduct, such as deliberate concealment or inaccurate reporting," but also "does not condone inattentiveness, carelessness, or inadequate record keeping," and the Department accordingly should apply the highest dumping margin calculated for any sale to Company A during the POI to all unreported sales to Company A.⁸⁵

Bongsan's Rebuttal Arguments

- Under 19 CFR 351.401(i), the Department will normally use the invoice date as the date of sale but "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." In determining the date or event when the material terms are established, the Department reviews not only whether such terms, particularly the price and quantity, in fact changed but also whether they were subject to change, even if no change occurred.⁸⁶
- The Department is not compelled to use the invoice date where the record supports the use of an alternative date.
- The *Preamble* to the Department's regulations explains that "{i}f the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale."⁸⁷

⁸³ See Sales Verification Report at 17 and Verification Exhibit SVE-5F.

⁸⁴ See Petitioner's Case Brief at 16-17.

⁸⁵ See Petitioner's Case Brief at 18, citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) and section 776(b) of the Act.

⁸⁶ See Bongsan's Rebuttal Brief at 9-10, citing *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090-1092 (CIT 2001) ("As elaborated by Department practice, a date other than invoice date 'better reflects' the date when 'material terms of sale' are established if the party shows that the 'material terms of sale' undergo no meaningful change (and are not subject to meaningful change) between the proposed date and the invoice date.") (*Allied Tube*).

⁸⁷ See *Preamble*, 62 FR at 27349; *see also* 19 CFR 351.401(i).

- In the *Preliminary Determination*, the Department generally accepted Bongsan's date of sale methodology, except that the Department used the invoice date instead of the shipment date as the date of sale for U.S. market sales.
- In *Allied Tube*, when determining the date on which the material terms of sale were established, the Department reviewed not only whether the price and quantity *actually* changed but also whether the terms were *subject to change*, even if no change occurred or changes did not occur in each particular instance.⁸⁸
- Even though a price and quantity are "set" on the Alternative Sale Date, the Department in its analysis must focus on whether material terms change or are subject to change. In this case, the record indicates that Bongsan's U.S. prices are subject to change until the time of shipment for all U.S. customers. During verification, the Department found that Bongsan's prices for U.S. customers are generally determined based on an LME copper price and a mark-up/premium that considers costs, market conditions and the LME price.⁸⁹ Moreover, the prices *did* change after the Alternative Sale Date in many instances for customers, including Company A, showing that sales were "subject to" change up until the shipment order date.⁹⁰
- Bongsan's practice of amending invoices without changing the date shows that even the invoice date is not the final indicator of the date on which price and quantity are established.
- Furthermore, there was a change with respect to Company A due to an incorrect price quote, which is concrete evidence of a change in the terms of sale and serves as *prima facie* evidence that the material terms of sale can and do change even after they are initially established.⁹¹
- Accordingly, Petitioner's contention that Bongsan incorrectly reported the date of sale for U.S. transactions must be rejected, because the record indicates that price and quantity are subject to change after the Alternative Sale Date, after the invoice date, and even after the date of shipment.⁹²
- The Department should reject Petitioner's argument that Bongsan did not act to the best of its ability, because certain Bongsan's post-POI sales that should have been reported under an alternative date of sale but were not, and therefore, an adverse inference should be applied to those unreported sales.
- The record indicates that Bongsan reported its sales in good faith, and it was not asked by the Department to use an alternative reporting method concerning date of sale. Bongsan acted to the best of its ability, and the reported POI sales are sufficient to establish the appropriate deposit rate should an antidumping duty order be issued. Therefore, no basis

⁸⁸ See, e.g., *Allied Tube*, 132 F. Supp. 2d 1087, 1090-1092 (CIT 2001) ("As elaborated by Department practice, a date other than invoice date 'better reflects' the date when 'material terms of sale' are established if the party shows that the 'material terms of sale' undergo no meaningful change (and are not subject to meaningful change) between the proposed date and the invoice date.").

⁸⁹ See Bongsan's Rebuttal Brief at 9, referencing Sales Verification Report at 8.

⁹⁰ See Bongsan's Rebuttal Brief at 10, and Sales Verification Report at 10.

⁹¹ See Bongsan's Rebuttal Brief at 11; see also Sales Verification Report at 10, and Sales Verification Exhibit SVE-8a at 7.

⁹² See Bongsan's Rebuttal Brief at 12.

exists for finding that Bongsan did not act to the best of its ability or that an adverse inference is warranted as to the date of sale.

Department's Position: Under 19 CFR 351.401(i), the Department will normally use the invoice date as the date of sale but "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 *Preamble* to the Department's regulations explains that "{i}f the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale."⁹³

In the *Preliminary Determination*, the Department chose to use the date of the commercial invoice as the date of sale for all of Bongsan's U.S. sales during the POI, because we found no evidence that the material terms of sale were subsequently changed after the commercial invoice was issued, except for certain sales to one of Bongsan's U.S. customers with which Bongsan had a special sale agreement.⁹⁴

At verification, we found that for one of its U.S. customers, Customer A, Bongsan established the material terms of sale as of the Alternative Sale Date.⁹⁵ Thus, for Customer A, Petitioner requests that the Department use the Alternative Sale Date as the date of sale in the final determination. As discussed below, we disagree with Petitioner that we should deviate from our *Preliminary Determination* and use the Alternative Sale Date as the date of sale for Company A.

In support of its proposal to use the Alternative Sale Date, Petitioner cites to *Carbon-Quality Steel Plate Products from Italy* where the Department rejected respondent's argument to use contract date as the date of sale, and continued to use the purchase-order confirmation date as the date of sale because the Department found that the material terms of sales were established on the purchase-order confirmation date, and there were no changes to the material terms of sales.⁹⁶

However, the facts of *Carbon-Quality Steel Plate Products from Italy* are distinct from those of the instant investigation. At issue in *Carbon-Quality Steel Plate Products from Italy* was the date of sale to be applied to *all* of respondent's U.S. sales.⁹⁷ In contrast, in the instant investigation, Petitioner proposes that the Department utilize the Alternative Sale Date as the date of sale for a single U.S. customer, while continuing to apply the invoice date as the date of sale for Bongsan's remaining customers. This is an important distinction because the method proposed by Petitioner for the instant investigation runs counter to the guidance provided in the *Preamble*, which states that:

⁹³ See *Preamble*, 62 FR at 27349; see also 19 CFR 351.401(i).

⁹⁴ See Preliminary Decision Memorandum at 11-12.

⁹⁵ See Sales Verification Report at 10-11, and Sales Verification Exhibit SVE-8a at 7, and SVEs 11a, 11d, and 11f; see also Petitioner's Case Brief at 16 and Bongan's Rebuttal Brief at 11.

⁹⁶ See *Carbon-Quality Steel Plate Products from Italy*, and accompanying Issues and Decision Memorandum at Comment 1.

⁹⁷ *Id.* at Comments 1 and 2.

. . . we have retained the preference for using a single date of sale for each respondent rather than a different date of sale for each sale. Contrary to suggestions made by some of the commenters, this has been the Department's practice in the past.

Moreover, there are several valid reasons for this practice. First, by simplifying the reporting and verification of information, the use of a uniform date of sale makes more efficient use of the Department's resources and enhances the predictability of outcomes.

. . . Therefore, for the foregoing reasons, we have continued to provide for the use of a uniform date of sale, which normally will be the date of invoice.⁹⁸

The Department's approach in the *Preliminary Determination* is consistent with the guidance set forth in the *Preamble*. The record indicates that, with the exception of Customer A, Bongsan established the terms of sale as of the invoice date.⁹⁹ This is why in the *Preliminary Determination*, the Department determined to use a uniform date of sales, *i.e.*, the commercial invoice date, for all of Bongsan's U.S. sales during the POI.

The record shows that Bongsan's sales agreements not only vary by customer, they also vary from order to order for the same customer with regard to the date on which the material terms of sales were established.¹⁰⁰ Because the material terms of sales during the POI are subject to change up until the commercial invoice date for all of Bongsan's U.S. customers except for Customer A, the Department's approach in the *Preliminary Determination* is consistent with the guidance set forth in the *Preamble*, as well as court precedent.¹⁰¹

Therefore, when taken as a whole, we find that Bongsan's sale process for U.S. sales indicates that the agreement on terms and conditions of sale for its U.S. customers took place as of the invoice date. Accordingly, the Department determines to continue using the invoice date as the date of sale for all of Bongsan's U.S. sales in this final determination.

In light of our decision to continue to use the invoice date as the date of sale, Petitioner's arguments that the Department should calculate a proxy date of sale for Company A, and should apply adverse facts available to post-POI sales to Company A are moot.

Lastly, in arguing why the Alternative Sale Date is not appropriate for purposes of the U.S. date of sale, Bongsan notes that the price and quantity of its U.S. sales may change after the shipment date.¹⁰² On this point, we note that in support of its claim that the price and quantity of its U.S.

⁹⁸ See *Preamble*, 62 FR at 27348-27349.

⁹⁹ See Sales Verification Report at 10 and 17 and Sales Verification Exhibit at SVE-5E, and see Preliminary Decision Memorandum at 12-13.

¹⁰⁰ See Sales Verification Report at 10.

¹⁰¹ See, *e.g.*, *Allied Tube & Conduit Corp. v. United States*, 25 CIT 23, 25-27 (2001); *SeAH Steel Corp. v. United States*, 25 CIT 133, 134 (2001); *Thai Pineapple Canning Ind. Corp. v. United States*, 24 CIT 107, 109 (2000), *aff'd in part, rev'd in part*, 273 F.3d 1077 (Fed. Cir. 2001); *Hornos Electricos de Venezuela v. United States*, 27 CIT 1522, 1536 (2003).

¹⁰² See Bongsan's Rebuttal Brief at 12, referencing the Sales Verification Report at 6.

sales may change as of the shipment date, Bongsan cites to the following statement of a company official, as noted in the Sales Verification Report:

Mr. Kim stated that the invoice date is based on the invoice that is sent to the Customs, even if there are changes to prices, the invoice date does not change.¹⁰³

We note that in making the claim the company official did not reference any supporting documentation. Further, the comment does not comport with the U.S. sales information examined by the Department officials during verification that indicated that the terms of sale were set as of the invoice date.¹⁰⁴ Thus, we disagree with Bongsan's claim that the record indicates that the material terms of its U.S. sales changed after invoice date and up to the shipment date.

Comment 4: Duty Drawback

Petitioner's Arguments

- In the *Preliminary Determination*, the Department found that Bongsan's reported amount of duty embedded in the COP was "unreasonable" given the reported duty actually drawn from the government. Accordingly, the Department made an adjustment to Bongsan's U.S. prices, pursuant to section 772 of the Act, to account for its duty drawback claim by dividing the total reported duty drawback by the total reported direct material cost and then applying this ratio to Bongsan's reported direct material cost.¹⁰⁵
- The Department should not modify the duty drawback adjustment for the final determination. Instead, it should continue to use the same methodology as in the *Preliminary Determination* by recalculating the adjustment based on Bongsan's consumption of direct material cost.¹⁰⁶
- Where the agency finds it appropriate to make a duty drawback adjustment, it is the Department's practice to make an adjustment to the U.S. price based on the per-unit amount of import duty included in the COP.¹⁰⁷
- Bongsan failed to provide any information on import duties included in the cost of production in the initial questionnaire, so in a supplemental questionnaire the Department directed Bongsan to revise its cost file to include a field that reports product matching control number (CONNUM)-specific per-unit duty costs incurred for raw materials for each duty scheme or to otherwise use a reasonable method to determine the per-unit amount of import duties included in the product-specific per-unit material costs.¹⁰⁸

¹⁰³ See Sales Verification Report at 6.

¹⁰⁴ *Id.*, at 10 and 17 and Sales Verification Exhibit at SVE-5E, and see Preliminary Decision Memorandum at 12-13.

¹⁰⁵ See Petitioner's Case Brief at 18-19; see also Preliminary Decision Memorandum at 12-13.

¹⁰⁶ *Id.*

¹⁰⁷ See Petitioner's Case Brief at 19; see also *Certain Corrosion-Resistant Steel Products from India: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 81 FR 35329 (June 2, 2016), and the accompanying Issues and Decision Memorandum at 7-9; and see Preliminary Decision Memorandum at 7-9.

¹⁰⁸ See Petitioner's Case Brief at 19; see also Bongsan's 1SQR-D at 7-8.

- In response, Bongsan explained that it does not record import duties in its ledger, so it developed a methodology to calculate the per-unit amount of import duties.¹⁰⁹
- Bongsan's estimation of the amount of import duties embedded in subject merchandise is based on a set of assumptions that are problematic for three reasons.
- First, Bongsan's calculation relies on its statement that the import duty for copper cathode is three percent, but Bongsan provided no documentation to support this statement.¹¹⁰
- Second, Bongsan relied on the raw material cost and revenue data for a Korean copper reseller, LS-Nikko, but provided no documentation to support these data.¹¹¹
- Third, Bongsan did not explain why the per-unit amount of copper import duties that it calculated as included in its costs differed from the amount it reported in its first supplemental questionnaire response.¹¹²
- In a supplemental questionnaire response submitted shortly after the *Preliminary Determination*, Bongsan revised its calculation of the duty embedded in its COP.¹¹³ However, Bongsan's revised calculation of its duty drawback continues to be problematic for two reasons.
- First, Bongsan has failed to fully support its calculation and justify its reliance on data from the copper reseller, LS-Nikko.¹¹⁴
- Second, while the revised values are closer to Bongsan's reported unit duty drawback, there is still an unreasonable difference.¹¹⁵
- The Department should continue to find that Bongsan's calculation of duty drawback results in unreasonable values and should, instead, rely on its own estimation based on the ratio of the duty drawback reported and the total direct material cost.

Bongsan's Rebuttal Arguments

- At verification, the Department confirmed that the reported amount of import duties paid was tied to the export of subject merchandise. The Department reviewed eight selected U.S. sales and found no discrepancies with regard to duty drawback.¹¹⁶ In addition, the Department examined Bongsan's Customs Duty Refund ledger and duty drawback applications for the second quarter of 2014, as well as Bongsan's duty drawback applications for the first quarter of 2015, and noted no discrepancies. Finally, in the Sales Verification Report, the Department noted that Bongsan's calculation of duty drawback as submitted in Bongsan's response to the second supplemental questionnaire "more closely tracks" Bongsan's reported duty drawback.
- There is no inherent discrepancy in actual drawback being lower than recorded duties. Drawback per ton of finished phosphor copper, which may contain only 85 percent phosphor copper, will be lower than the duty on a ton of pure copper purchased and used as an input.

¹⁰⁹ See Petitioner's Case Brief at 19-20; see also 1SQR-D at 7-8.

¹¹⁰ See Petitioner's Case Brief at 20.

¹¹¹ *Id.*; see also Bongsan's Cost Verification Report at 14.

¹¹² See Petitioner's Case Brief at 22.

¹¹³ See Bongsan's second supplemental section D questionnaire response (2SQR-D), dated October 11, 2016 at 4-5.

¹¹⁴ See Petitioner's Case Brief at 20.

¹¹⁵ *Id.*

¹¹⁶ See Bongsan's Rebuttal Brief at 13. See also Sales Verification Report at 21, 27-28.

In addition, duties on copper input will include copper that was consumed but not incorporated in the final exported product, *i.e.*, yield loss related to copper. As a result, comparing the duty amounts to the drawback amounts is not an “apples-to-apples” comparison.

Department’s Position: Pursuant to section 772(c)(1)(B) of the Act, the Department will grant a duty drawback adjustment to export price where a respondent party establishes that: (1) the import duty paid and the rebate payment are directly linked to, and dependent upon, one another (or the exemption from import duties is linked to exportation); and (2) there were sufficient imports of the imported raw material to account for the drawback received upon the exports of the manufactured product (*i.e.*, the “two-prong test”). Regarding the first prong, it is not the Department’s practice to require demonstration of duties paid to receive the duty drawback adjustment,¹¹⁷ as evidenced by the fact that the Department has granted the drawback adjustment for exemption as well as duty refund programs.

Bongsan reported a fixed amount of duty drawback refund per kilogram in its U.S. sales database that was calculated based on the “Fixed Amount Refund Rate” table issued by the Korean government.¹¹⁸ Because this amount differs significantly from Bongsan’s calculated duty embedded in its COP, in the *Preliminary Determination*, we determined that Bongsan’s calculated value of duty included in its COP was unreasonable and, therefore, we recalculated the estimated duty included in Bongsan’s COP based on the ratio of the reported duty drawback and the total direct material cost.¹¹⁹ In its post-preliminary section D response, Bongsan refined its calculation of the unit amount of import duty included in COP by applying an average of Korean import duty rates for copper during the POI.¹²⁰ We noted that the revised method narrows the range of the estimated duty included in its COP, which is also closer to Bongsan’s reported duty drawback claim.¹²¹ However, Bongsan still did not provide payment records for import duties paid.¹²²

At the sales verification, Bongsan stated that because Korea does not have copper reserve, all of copper needed in Korea is imported from other countries.¹²³ However, Bongsan did not import copper directly. Rather, it purchased copper from Korean importers, who did not separately list the amount of duties paid for the imported copper.¹²⁴ Thus, Bongsan does not have a separate line item to identify duty payments for the imported copper in its raw materials ledger.

¹¹⁷ See *Far East Machinery Co. v. United States*, 688 F. Supp. 610 (CIT 1988) (ordering a remand) and 699 F. Supp. 309 (CIT 1988) (affirming the Department’s remand).

¹¹⁸ See Bongsan’s first supplemental sections B&C questionnaire response (1SQR-BC), dated July 29, 2016 at 12-13, and Exhibit SC-11; see also Exhibit SC-10 for the regulation for duty drawback – Act on special cases concerning the refund of customs duties, etc. levied on raw materials for export, and Exhibit SC-12 for the duty drawback supporting documents; see also Sales Verification Report at Exhibit SVE-14 at 30.

¹¹⁹ See Preliminary Decision Memorandum at 17.

¹²⁰ See Bongsan’s 2SQR-D at 4-5, and Exhibit SSD-8; see also Sales Verification Report at Exhibit SVE-14.

¹²¹ See Bongsan’s 2SQR-D at 4-5, and Exhibit SSD-8; see also Sales Verification Report at Exhibit SVE-14.

¹²² *Id.*; see also Cost Verification Report at 10 and 13.

¹²³ We obtained a listing showing all countries from which Korea imported copper, and the country-specific import duty rate imposed by Korean Customs. See Sales Verification Report at Exhibits SVEs-5B and 5G.

¹²⁴ See Sales Verification Report at 27-28.

At its sales verification, we were able to reconcile the total reported duty refund for the POI to Bongsan's income statement. We also examined Bongsan's duty drawback refund for two quarters, and we tied the total quarterly duty refund to the ledger.¹²⁵ In addition, we matched the duty refund to the commercial invoice on a sale-specific basis from the information contained in "Export Report Permission" form and in the "Duty Drawback Application" form (*e.g.*, HS number, product name, quantity and value, etc.).¹²⁶ Furthermore, we also obtained copies of two external quality test reports for copper cathodes. On the "Certificate of Analysis," we noted that the country of origin for the copper at issue is listed. We also noted that the import duty rate for copper from this country is three percent.¹²⁷

At verification, we reconciled the total duty refund reported by Bongsan to its financial statement, as well as the approved duty refund to the specific merchandise to be exported by Bongsan and, therefore, we find that Bongsan meets the second prong of the Department's test.

However, we could not link the import duty refund to the import duty payment due to the fact that Bongsan did not import copper directly and, therefore, did not bear any liability if it failed to adhere to the Korean fixed-rate program (*i.e.*, did not export the finished product and was responsible for import duties). In addition, Bongsan was not able to provide a complete accounting of the country of origin of its imported copper.¹²⁸ As a result, we find that the first prong of the Department's test is not met because: 1) Bongsan was not the importer of the input and not liable for the import duties and; 2) we lack sufficient information on the origin of Bongsan's imports (*i.e.*, the origin of the copper). Consequently, we cannot establish the link between imported inputs and the duty refund upon export.

Accordingly, we did not grant the duty drawback adjustment to Bongsan and have removed the duty drawback credit from Bongsan's final SAS Comparison Market and Margin Programs.¹²⁹

Comment 5: Ministerial Error Regarding U.S. Billing Adjustments

Petitioner's Arguments

- When the Department modified the margin program to account for a billing adjustment for sales to a U.S. customer in its *Preliminary Determination*, it inadvertently used the wrong field name to apply the adjustment which was intended to account for adjustments to sales prices.¹³⁰

¹²⁵ *Id.*, at 26-27 and Exhibit SVE-5B.

¹²⁶ *Id.*

¹²⁷ See Sales Verification Report at 17-18 and Exhibit SVE-5G.

¹²⁸ We note that Bongsan could only identify the origin of a limited number of shipments. See Sales Verification Report at 27-28.

¹²⁹ See Memorandum from Cindy Robinson to Eric B. Greynolds, "Analysis for the Final Determination of the Less-Than-Fair Value Investigation of Phosphor Copper from the Republic of Korea for Bongsan Co., Ltd." ("Final Sales Calculation Memorandum") dated concurrently with this memorandum. See also the Bongsan's final CM Program at Part 3-E, and final SAS Margin Program at Parts 1-E-ii, and 2-A.

¹³⁰ See Petitioner's Case Brief at 3.

- Bongsan reported in its U.S. sales database the names of customers under field “CUSCODU” and it reported four-digit consolidated customer codes under field “CCUSCODU.”¹³¹
- In the *Preliminary Determination* margin program, the Department applied a four-digit code assigned to the field “CCUSCODU” to the wrong field name “CUSCODU.”¹³² As a result, the billing adjustments related to sales to this customer are not properly captured.
- The Department should correct this ministerial error in the final determination.

Bongsan’s Rebuttal Arguments

Bongsan did not comment on this issue.

Department’s Position: We agree with Petitioner and have corrected the final SAS margin program by identifying the customer at issue with the correct field name, CCUSCODU.¹³³

Comment 6: Revision to Indirect Selling Expense Ratios

Background

In its responses, Bongsan included gains and losses on foreign currency transactions and on foreign currency translation in its calculation of indirect selling expenses (“ISE”). In addition, Bongsan calculated separate ISE ratios for its home market sales and for export sales during the POI.

Department’s Position: As discussed in Comment 2 above, the Department finds that the gains and losses on foreign currency transactions or foreign currency translation should be classified as financial expenses instead of ISE. Accordingly, we have removed these gains and losses from the calculation of ISE ratios in the final determination. *See* Final Sales Calculation Memorandum for details.¹³⁴

¹³¹ *Id.*

¹³² *Id.*, at 3-4.

¹³³ *See* Bongsan’s final Margin Program at Part 2-B.

¹³⁴ *See* Final Sales Calculation Memorandum. *See also* Bongsan’s final SAS CM program at Part 2-B, and final SAS Margin Program at Parts 2-B and 4-A.

IX. Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the *Federal Register*, and notify the International Trade Commission of our findings.



Agree

Disagree

2/27/2017

X 

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance