



A-580-886

POI: 01/01/2015 – 12/31/2015

Public Document

E&C/OIV: KG, EL

DATE: March 16, 2017

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

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

SUBJECT: Ferrovanadium from the Republic of Korea: Issues and Decision
Memorandum for the Final Determination of Sales at Less-Than-Fair-Value

I. SUMMARY

The Department of Commerce finds that ferrovanadium from the Republic of Korea (“Korea”) is being, or is likely to be, sold in the United States at less than fair value (“LTFV”), as provided in section 735 of the Tariff Act of 1930, as amended (“the Act”). The period of investigation (“POI”) is January 1, 2015, through December 31, 2015.

As a result of our analysis, and based on our findings at verification, we made changes to the margin calculations for Korvan Ind. Co., Ltd. (“Korvan”), the sole cooperating respondent in this investigation. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

II. LIST OF ISSUES

- Comment 1: Whether the Department Should Use Contract Date as the Date of Sale for Korvan’s Sales to one of its U.S. Customers
- Comment 2: Duty Drawback
- Comment 3: Whether the Department Should Continue to Treat Korvan’s Separate Home Market Sale of Korvan-Produced and Korvan-Purchased Ferrovanadium as a Separate Sale
- Comment 4: Whether the Department Should Apply Its Standard Average-To-Average Method Calculating the Margin in the Final Determination
- Comment 5: Whether the Department Made Certain Ministerial Errors in its Calculations

Comment 6: General and Administrative (“G&A”) Expenses

Comment 7: Financial Expenses

Comment 8: Whether to Continue to Apply a Quarterly Cost Methodology

III. BACKGROUND

On October 25, 2016, the Department published the *Preliminary Determination* of sales at LTFV in the antidumping duty investigation of ferrovanadium from Korea. Between November 14, 2016, and November 18, 2016, the Department conducted sales and cost verifications at Korvan, in accordance with section 782(i) of the Act. On November 30, 2016, Korvan requested a public hearing.¹ On December 1, 2016, the Vanadium Producers and Reclaimers Association (“VPRA”) and VPRA members AMG Vanadium LLC, Bear Metallurgical Company, Gulf Chemical & Metallurgical Corporation, and Evraz Stratcor, Inc., jointly and severally (hereinafter, “Petitioners”) also requested a hearing.² Korvan and Petitioners submitted case briefs on January 9, 2017,³ Korvan and Petitioners submitted rebuttal briefs on January 17, 2017.⁴ The Department held the requested hearing on February 15, 2017.

IV. SCOPE OF THE INVESTIGATION

The product covered by this investigation is all ferrovanadium regardless of grade (*i.e.*, percentage of contained vanadium), chemistry, form, shape, or size. Ferrovanadium is an alloy of iron and vanadium. Ferrovanadium is classified under Harmonized Tariff Schedule of the United States (“HTSUS”) item number 7202.92.0000. Although this HTSUS item number is provided for convenience and Customs purposes, the written description of the scope of the investigation is dispositive.

V. DISCUSSION OF THE ISSUES

Comment 1: Whether the Department Should Use Contract Date as the Date of Sale for Korvan’s Sales to one of its U.S. Customers

Petitioners’ Comments:

- Petitioners argue that the information on the record and the analysis the Department performed at verification demonstrate that the appropriate date of sale for Korvan’s sales to one of its U.S. customers⁵ that were made pursuant to Contract A and Contract B⁶ is

¹ See Korvan’s Request for Hearing, November 30, 2016.

² See Petitioners’ Request for a Hearing, December 1, 2016.

³ See Korvan Case Brief, January 9, 2017; Petitioners’ Case Brief, January 10, 2017.

⁴ See Petitioners’ Rebuttal Brief, January 17, 2017; Korvan’s Rebuttal Brief, January 17, 2017.

⁵ Due to the fact that certain information regarding the sales and contracts in question is business proprietary information, a version of the summary of parties’ arguments and the Department’s position on this issue, both with the proprietary information included, are contained in the Memorandum to the File from Karine Gziryan, Senior Financial Analyst, AD/CVD Operations, Office IV, Enforcement and Compliance entitled, “Antidumping Duty Investigation of Ferrovanadium from the Republic of South Korea: Proprietary Discussion of Issues Contained in the Issues and Decision Memorandum,” dated concurrently with this memorandum (“BPI Memorandum”).

⁶ See Letter from Korvan to the Honorable Penny S. Pritzker, Secretary

the contract date.

- Petitioners claim that according to 19 CFR 351.401(i), the Department normally will use the date of invoice; however, this regulation also states that the Department may use a source other than the invoice date if it is “satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.”⁷
- Petitioners argue that for Korvan’s sales to the customer at issue, there is sufficient evidence on the record to overcome the Department’s regulatory preference to use invoice date as the date of sale.
- Petitioners disagree with the information in the Department’s sales verification report indicating that the provisional invoice date reported by Korvan as the date of sale is the point at which the quantity and value of the sales and the delivery terms are established.⁸
- Petitioners argue that the Department also stated in its verification report that Contract B “contains general terms insufficient to determining the specific terms of a sale, including a {certain} window for shipping, a vanadium content estimate, and a total quantity that {could vary}, depending on the customer,”⁹ but that this conclusion is not supported by the facts on the record.
- Petitioners contend that the data on the record demonstrate that a “meeting of the minds”¹⁰ on the material terms of sale between Korvan and the customer at issue occurred on the date of contract, not on the date of the provisional invoice, and that any changes occurring after the date of contract were “usually immaterial in nature or, if material, rarely occur.”¹¹

Quantity

- Petitioners argue that comparing the shipments made pursuant to both Contract A and Contract B to the terms regarding sales quantities established in these contracts¹² is evidence that Korvan and the customer at issue considered the contracts as establishing the quantities of the sales governed by the contracts.¹³ Petitioners conclude that these facts support a finding that contract date was the date on which there was a “meeting of the minds” between these parties on the quantity of the sales and, therefore, contract date is the appropriate date of sale for Korvan’s sales pursuant to Contract A and Contract B.
- Petitioners state that, in *Steel Plate from Romania*,¹⁴ the Department found that the

of Commerce, re: Response to Section A Supplemental Questionnaire – BPI Version (July 15, 2016) (“Korvan July 15 Supplemental Section A Response”) at 9-10 and Exhibit SA-6 and Korvan’s August 12 Supplemental Response at Exhibit SC-3.

⁷ See Petitioners’ Case Brief at 21.

⁸ See Petitioners’ Case Brief at 23.

⁹ See Sales Verification Report at 7. See letter from Korvan to the Honorable Penny S. Pritzker, Secretary of Commerce, re: Sales Verification Exhibits - BPI Version (November 23, 2016) (“Korvan Sales Verification Exhibits”) at Exhibit 13.5.

¹⁰ See Petitioners’ Case Brief at 21 and *Nucor Corporation v. United States*, 612 F. Supp. 2d 1264, 1303 (Ct. Int’l Trade 2009) (“*Nucor*”).

¹¹ See *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 32833, 32836 (June 16, 1998) (“*Korean Pipe*”).

¹² See Petitioners’ Case Brief at 24 and Exhibit 5.

¹³ See BPI Memorandum at 2.

¹⁴ See *Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain*

contract date (the order acknowledgement in that case) was the appropriate date of sale, even though the contract quantity tolerance was exceeded to a minor degree. Comparing the facts on the instant record (*i.e.*, the shipments made pursuant to both Contract A and Contract B and the terms regarding sales quantities established in these contracts)¹⁵ to the facts in *Steel Plate from Romania* provides reason for the Department to consider Korvan's dates of contracts for Contracts A and B as the dates of sale for sales made pursuant to those contracts for the final determination.

Price

- The prices reflected in Korvan's provisional invoices related to the contracts at issue (the dates of those invoices were used as the date of sale in the *Preliminary Determination*) are not the final sales prices.¹⁶
- On the other hand, the mechanism for determining the sales price that is specified in the contracts at issue does set the final sales price without further negotiation between the parties.¹⁷ Thus, the prices for U.S. sales made pursuant to these contracts were established by the contracts. Because the price was established as of the dates parties entered into the contracts at issue, contract date is the appropriate date of sale for sales pursuant to these contracts.

Vanadium Content Estimate

- Petitioners argue that, according to the record,¹⁸ the vanadium content of each shipment of ferrovanadium governed by the contracts at issue was established at the time of the contracts,¹⁹ and thus, the contract date is the appropriate date of sale for sales under Contract A and Contract B.
- Petitioners further argue that, even though the verification report states that, in "several instances, Korvan's customer determined a different percentage of vanadium content for the product than the percentage determined by Korvan, resulting in Korvan issuing a billing adjustment to reflect a *revised price* before receiving payment,"²⁰ the customers' determination of the vanadium content of the ferrovanadium received determined the final quantity shipped and did not affect the unit price. According to Petitioners, the relevant billing adjustment resulted in a revision of total invoice value (price (unchanged)

Cut-to-Length Carbon Steel Plate from Romania, 72 Fed. Reg. 6522 (February 12, 2007) ("*Steel Plate from Romania*") and accompanying Issues and Decision Memorandum at 7.

¹⁵ See BPI Memorandum at 3.

¹⁶ See, *e.g.*, Sales Verification Report at 12 ("All billing adjustments were completed on the provisional invoice date, and netted out against the gross sales revenue on the date of the entry of the sales information in the sales ledger, with the exception of sales to one customer ... as Korvan identified it in its sales ledger."), emphasis added. See also Letter from Korvan to the Honorable Penny S. Pritzker, Secretary of Commerce, re: Response to Questionnaire Sections B, C, and D (July 7, 2016) at Section C ("Korvan Initial Section C Response"), p. 16 ("The U.S. sale price is typically set by sales contract"), and Korvan's August 12 Supplemental Response at 16.

¹⁷ See, *e.g.*, *id.*, Korvan's September 16 Supplemental Response at 10-11 and Exhibit SC-12 and Sales Verification Report at 7 and 12.

¹⁸ See Petitioners' Case Brief at 28 and Exhibit 5.

¹⁹ See BPI Memorandum at 3.

²⁰ See Sales Verification Report at 7. See, *e.g.*, Korvan's Exhibits SC-3 and SC-5.

multiplied by quantity of contained vanadium received (changed)), but not a revision of price.

Window for Shipping/Delivery

- Petitioners point out that the Department, on several occasions, found that long-term contracts can establish the material terms of sale, rather than the invoices issued pursuant to such contracts.²¹ Thus, Petitioners argue that the window for shipping or delivering products pursuant to Contract A and Contract B,²² particularly in light of the other factors discussed, does not support a conclusion that contract date is not the appropriate date of sale for Korvan's sales to the customer at issue.

Delivery Terms

- Petitioners argue that, because the delivery terms for shipments subject to Contract A were established at the time of the contract prior to the provisional invoice, contract date is the appropriate date of sale for Korvan's sales to the customer at issue.

Implementation and Effect of Using the Contract Date as the Date of Sale for Contract A and Contract B for the Final Determination

- Petitioners conclude that, for the reasons stated above, contract date is the only appropriate date of sale for the sales governed by Contract A and Contract B. Petitioners contend that if the Department uses contract date as the date of sale for these contracts, certain adjustments²³ must be made to the U.S. sales database for the final determination.²⁴
- Petitioners point out that the same factual information discussed above with respect to Contracts A and B does not exist for the Department to change the date of sale it used in the *Preliminary Determination* for other sales.²⁵
- Petitioners contend that, in past proceedings, the Department identified different dates of sale for different portions of a respondent's POI sales based upon different circumstances applicable to the respective categories of sales.²⁶ Consequently, the record evidence

²¹ See Petitioners' Case Brief at 29 and *Steel Plate from Romania* at 8. See also *Korean Pipe*, 63 Fed. Reg. at 32836 ("{T}here is no information on the record indicating that the material terms of sale change frequently enough on US sales so as to give both buyers and sellers any expectation that the final terms will differ from those agreed to in the contract.")

²² See BPI Memorandum at 4.

²³ See BPI Memorandum at 5.

²⁴ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin from Indonesia*, 70 Fed. Reg. 13456 (March 21, 2005) and accompanying Issues and Decision Memorandum at Comment 1 (explaining that where the period of investigation covered calendar year 2003, "we continue{d} to exclude EP DDP sales contracted in 2002 and invoiced in 2003 from our consideration.")

²⁵ See BPI Memorandum at 5.

²⁶ See, e.g. *id.* (stating that the respondent "reported the invoice date as the date of sale for all U.S. sales, with the exception of EP DDP sales" and that we determine{d} that the contract date firmly establishe{d} the material terms of sale in EP DDP sales, and therefore, best represents the date of sale.")

supports using contract date as the date of sale only for sales governed by Contract A and Contract B with the customer at issue.

Respondent's Comments:

- Respondent claims that Petitioners did not meet their burden of establishing that any date other than the invoice date better reflects when the material terms of the sale were established.²⁷
- Respondent asserts that, as it is demonstrated in Korvan's questionnaire response exhibits, and recorded by the Department at the sales verification, all of Korvan's contracts provide that prices shall be determined based on the market price as of a quoted future period. Consequently, respondent points out, the Department determined that Korvan's "sales contract contains general terms insufficient to determining the specific terms of a sale, including a {certain} window for shipping, a vanadium content estimate, and a total quantity that {varied}." ²⁸ Respondent argues that, for these reasons, it is impossible to calculate the price as of the date of the contract.
- Additionally, respondent notes, contrary to Petitioners' assertion, other terms, such as the delivered quantities, are also not established by the contract. Respondent asserts that the mere fact that the delivered quantities for some sales were similar to quantities listed in the contracts does not prove that the quantity was established as of the contract date.²⁹
- Respondent argues that the Department should continue to use the invoice date as the date of sale in the final determination, because Petitioners failed to meet their burden of establishing that a date of sale other than invoice date could better reflect when the material terms of the sales were established.

Department's Position:

We disagree with Petitioners that the Department should use the contract dates of Korvan's Contracts A and B as the dates of sale for the U.S. sales governed by these contracts. We have continued to use the invoice date as the date of sale for all U.S. sales for the final determination.

Section 351.401(i) of the Department's regulations states that, "{i}n identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business." However, the regulation provides that the Department 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.³⁰ Additionally, the Department has a long-standing practice of finding that, where shipment date precedes invoice date, shipment date better reflects the date on which the material terms of sale are established.³¹

²⁷ See Petitioners' Case Brief, dated January 10, 2017, at 26-28.

²⁸ See Sales Verification Report at 7-8.

²⁹ See Petitioners' Case Brief at Exhibit 5.

³⁰ See 19 CFR 351.401 (i); see also *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001) (*Allied Tube*) (quoting 19 CFR 351.401 (i)).

³¹ See *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 (December 23, 2004),

The burden is on the party seeking to establish a date of sale other than invoice date to “satisfy” the Department that an alternate date is more appropriate.³² Petitioners advocate using the dates of Contracts A and B as the dates of sales to certain U.S. customers because, they claim, none of the terms established in Contracts A and B changed. However, Petitioners do not suggest using contract dates as the dates of sales to other U.S. customers. The Department’s practice is to examine the entire record, across all customers in the given market, to determine whether the terms of a respondent’s contracts are subject to change. If there are examples of material terms of sale changing after the contract date, then the regulatory presumption of invoice date being the appropriate date of sale is not overcome. Thus, as the CIT has stated, “the existence of ... one sale beyond contractual tolerance levels suggests sufficient possibility of changes in material terms of sale so as to render Commerce’s date of sale determination {use of invoice date} supported by substantial evidence.”³³

In addition, the Department’s preference is to use a uniform date of sale rather than different dates of sales for different sales.³⁴ As the Department noted in the *Preamble* to the governing regulations, we have established a “preference for using a single date of sale for each respondent, rather than a **different date of sale** for each sale.”³⁵ Furthermore, in *Harwood and Decorative Plywood from the People’s Republic of China*, the Department stated:

Although Congress expressed its intent, that for antidumping purposes, the date of sale be flexible so as to accurately reflect the true date on which the material elements of sale were established, the Department has a clear preference for “using a single date of sale for each respondent, rather than a different date of sale for each sale” because, *inter alia*, “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.”³⁶

The record shows that the terms of certain contracts did change.³⁷ Given that the terms of

and accompanying Issues and Decision Memorandum at Comment 10; *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.

³² *See Allied Tube*, 132 F. Supp. 2d at 1090.

³³ *See id.* at 1091; *see also Thai Pineapple Canning Ind. Corp. v. United States*, 24 C.I.T. 107, 109 (holding that “{t}here was no reason for Commerce to abandon its presumption” where “the evidence {wa}s that the terms could be changed and were changed in some instances.”).

³⁴ *See, e.g., Large Power Transformers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 14087 (March 16, 2016), and accompanying Issues and Decision Memorandum at Comment 11 (explaining the Department’s practice of relying on a uniform date of sale).

³⁵ *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27349 (May 19, 1997) (*Preamble*) (emphasis added).

³⁶ *See Notice of Preliminary Determination of Antidumping Duty Investigation: Hardwood and Decorative Plywood from the People’s Republic of China*, 78 FR 25946 (April 29, 2013), and accompanying Decision Memorandum for Preliminary Determination. *See also Allied Tube and Conduit Corp. v. United States*, 127 F. Supp. 2d 207, 218 (CIT 2000); *see also Preamble* at 27348-50 (explaining the reasons why the Department retains the preference for using a single date of sale).

³⁷ *See Respondent’s Rebuttal Brief* at 14 and *Sales Verification Report* at 7-8.

contracts did change, there was no expectation that contracts always established the final terms of sale, notwithstanding the particular experience during the POI with respect to Contracts A and B. Thus, the regulatory presumption of invoice date has not been overcome. Unlike the facts in the instant investigation, in *PET Resin from Indonesia*,³⁸ which Petitioners relied upon to advocate using different dates of sales, the Department found “that the contract firmly establishes the material terms of sale in EP DDP sales, and therefore, best represents the date of sale.” Hence, we disagree with Petitioners’ arguments and continue to determine that the invoice date is the most appropriate sale date for all U.S. market sales in this case.

Comment 2: Duty Drawback

Petitioners’ Comments:

- The Department is directed by 19 U.S.C. § 1677a(c)(1)(B) to increase the price used to establish export price by “the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States.”³⁹
- The Department determines whether to make a duty drawback adjustment based on a “two-pronged” test. First, the Department determines whether the import duty and its corresponding rebate or exemption are directly linked to, and dependent upon, one another. The Department does so by analyzing records to “determine if the information is sufficient to examine the drawback system and to determine if the government has controls in place to enable the Department to examine the criteria for receiving a duty drawback.”⁴⁰ Second, the Department determines whether the company demonstrates that there were sufficient imports of the imported material to account for the amount of import duty refunded or exempted for the export of the manufactured product.⁴¹
- The Department’s precedent for denying a duty drawback adjustment was established in *OCTG from India*, wherein the information provided “did not demonstrate how the {Government of India} calculated the duty drawback rates in general... or state the specific factors that were considered to ascertain this rate or that cause the rate to change every year. By (the Respondent’s) own admission, the drawback it receives is not tied to the quantity which it imports (*i.e.*, it would have received drawback even if it imported no

³⁸ See *Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET Resin from Indonesia)*, 70 Fed. Reg. 13456 (March 21, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

³⁹ See 19 U.S.C. §1677a(c)(1)(B).

⁴⁰ See *Certain Oil Country Tubular Goods from India: Preliminary Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part, and Postponement of Final Determination*, 79 Fed. Reg. 10493 (February 25, 2014) and accompanying Preliminary Decision Memorandum at page 13, citing *Notice of Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 71 FR 7513 (February 13, 2006), and accompanying Issues and Decision Memorandum at Comment 2.

⁴¹ See *Certain Corrosion-Resistant Steel Products from India: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 81 Fed. Reg. 35329 (June 2, 2016) (“2016 Corrosion Resistant Steel from India”) and accompanying Issues and Decision memorandum at Comment 1, citing to *Saha Thai Steel Pipe (Pub.) Co. v. United States*, 635 F.3d 1335 (Fed. Cir. 2011).

inputs whatsoever).”⁴²

- Korvan receives duty drawback “under the ‘simplified fixed refund’ method where the amount of rebated duty is based on a fixed percentage of the FOB value of exports of ferrovanadium. The fixed percentage is determined based on “the average refund money of the customs duties, *etc.* or the average paid tax amount on the raw materials for export.”⁴³ These fixed percentage refunds are not dependent upon the amount – if any – of the import duties paid by the small or medium sized enterprise using the ‘simplified fixed refund’ method.
- Thus, the first prong of the Department’s duty drawback test is not met: the amount of import duty paid by Korvan on imports of vanadium pentoxide is not directly linked, or dependent upon, the refund it received based on its exports of ferrovanadium. Record evidence regarding Korvan supports such a finding.
- Based on a review of Korvan’s application for the fixed-rate drawback, the amount of import duty Korvan might have paid was irrelevant to the amount of refund that Korvan received under the fixed-duty drawback scheme.⁴⁴
- The decree that Korvan submitted regarding the Korean duty drawback program states that where a party claiming duty drawback uses both domestically-produced raw materials and imported raw materials “interchangeably in the production process of export goods,” the domestically-produced raw materials “shall be deemed raw materials for export.”⁴⁵ Based on this statement, Korvan would receive the same amount of duty drawback refund regardless of the proportion of imported and domestic raw materials it purchased, further indicating that the amount of duty drawback Korvan received is not linked to the amount of import duty it paid on imports of raw material.
- Korvan noted that, because it is a medium-sized business, it would continue to receive duty drawback at a fixed rate despite a Government of Korea publication stating that the import duty rate for vanadium pentoxide from China “became zero on December 20, 2015, pursuant to a trade agreement,”⁴⁶ further confirming that the amount of duty drawback Korvan received during the POI was based on its size and the fact that it exported ferrovanadium. Any duties Korvan paid on imports of vanadium pentoxide during the POI were independent of the amounts of duty drawback it received based on its exports of ferrovanadium.
- For the reasons stated above, Korvan has not satisfied the required first prong of the Department’s test to determine the acceptability of a claimed duty drawback adjustment.

Respondent’s Comments:

⁴² See *Certain Oil Country Tubular Goods from India: Preliminary Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part, and Postponement of Final Determination*, 79 Fed. Reg. 10493 (February 25, 2014) and accompanying Preliminary Decision Memorandum at page 13, citing Letter from Jindal SAW, “OCTG from India: 1st Supplemental Section ABC Response,” January 14, 2014 (Jindal SAW January 14 SQR), at 34.

⁴³ See *id.* at Exhibit 25, p. 6.

⁴⁴ See *e.g., id.* at Exhibit 25, p.3-5.

⁴⁵ See Korvan September 16 Supplemental Response at Exhibit SC-12 at Article 3 (Raw Materials Subject to Refund), Section (2).

⁴⁶ See Sales Verification Report at 23.

- The Department verified that Korvan was entitled to submit applications to the Government of Korea in 2015 to obtain duty drawback.
- With respect to the first prong of the Department's duty drawback test, and contrary to Petitioners' assertions, Korvan demonstrated the linkage between the import duty paid and the corresponding rebate. Specifically, Korvan showed that: (a) it is eligible under Korean law for the fixed rate refund; (b) it applied for the duty drawback refund; (c) its exports of the subject merchandise entitled it to receive the duty drawback refund; and (d) its bank statement showed that the duty drawback refunds had been wired to Korvan's account directly from Korean customs.⁴⁷
- With respect to the second prong of the Department's duty drawback test, Korvan demonstrated that it imports 100 percent of its major input, vanadium pentoxide, which means that there were sufficient imports of the imported material to account for the amount of import duty refunded.

Department's Position:

We agree with Petitioners that Korvan failed to satisfy the first prong of the two-prong duty drawback test employed by the Department to determine whether to grant a respondent a duty drawback adjustment. Section 772(c)(1)(B) of the Act provides for an upward adjustment to U.S. price for duty drawback on import duties which have been rebated (or which have not been collected) by reason of the exportation of the subject merchandise to the United States. In accordance with this provision, we will grant a duty drawback adjustment if we determine that: (1) import duties and rebates are directly linked to, and are dependent upon, one another; and (2) the company claiming the adjustment can demonstrate that it has had sufficient imports to account for the duty drawback received on exports of the manufactured product.

Korvan claimed that, during the POI, it applied for, and received, refunds for import duties paid for raw material inputs under the simplified "fixed-rate" drawback program applicable to small- and medium-sized companies.⁴⁸ Under this fixed-rate duty refund system, the amount of the duty drawback received by Korvan is based on a percentage of the FOB value of exports, not on the amount of import duties paid by the company for raw material inputs.⁴⁹ In fact, under the fixed-rate drawback program, Korvan was not required to demonstrate payment of import duties in its application for subsequent refunds.⁵⁰ As such, the amount of the duty drawback that Korvan receives, and the amount of import duties that it pays, are not directly linked to, and dependent upon, one another, as required by prong one of the Department's two-prong duty drawback test. While Korvan argues that it is eligible to receive a duty drawback under the fixed-rate program because it exported merchandise, it has not sufficiently demonstrated that the payment of import duties directly links to the duty refund under this program.⁵¹

This position is consistent with past Department determinations. In *Steel Wire Rope from the Republic of Korea*, the Department stated that:

⁴⁷ See Sales Verification Report at 22-24.

⁴⁸ See Sales Verification Report at 22.

⁴⁹ See Petitioner's Case Brief at 37.

⁵⁰ See Response to Section A, C, & C Supplemental Questionnaire at 23 and Exhibit SC-8.

⁵¹ See Petitioner's Case Brief at 37, citing Sales Verification Report at 22.

“Companies that claim drawback using the individual, not simplified, reporting method must provide information to the government regarding actual import duties paid on inputs used in the production of the exported merchandise for which they claim drawback. Accordingly, unlike companies that claimed drawback using the individual reporting method ... the companies that used the simplified reporting method were unable to demonstrate a connection between payment of import duties and receipt of duty drawback on exports of steel wire rope.”⁵²

In *Top-of-the-Stove Stainless Steel Cooking Ware from the Republic of Korea*, the Department noted that:

“{a}ccording to Dong Won the duty refunded is a fixed percentage of the export amount. ... Thus, the information submitted by Dong Won demonstrates only that the amount of duty rebated is tied to the FOB price of the exported merchandise. ... There is no evidence on the record that the amount of duty rebated and received by Dong Won is directly linked to or dependent upon import duties paid by Dong Won.”⁵³

In the following administrative review of *Top-of-the-Stove Stainless Steel Cooking Ware from the Republic of Korea*, the Department noted that:

“{The Department} has repeatedly found that the fixed-rate system, by itself, does not meet the Department’s two-prong test. ... The fixed-rate scheme fails to meet the Department’s two-prong test on its own merits because the amount of rebate upon export is based upon the average experience of companies using the individual-rate scheme. In other words, the amount of rebate received by Dong Won and other companies under the fixed-rate system is not based on their own individual experience and, therefore, may be more, less, or equal to the amount of the actual paid on the inputs. ... there is no record evidence that the amount of duty rebated and received by Dong Won is directly linked to or dependent upon import duties paid by Dong Won.”⁵⁴

Based on the foregoing, we have denied Korvan’s claim for a duty drawback adjustment.

Comment 3: Whether the Department Should Treat Korvan’s Home Market Sale of a Combination of Korvan-Produced and Korvan-Purchased Ferrovanadium as a Single Sale

Petitioners’ Comments:

- The Department must reject Korvan’s pricing of Korvan-produced ferrovanadium sold in

⁵² See *Steel Wire Rope from the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 55965-01 (October 30, 1996) (“*Steel Wire Rope from the Republic of Korea*”) at Comment 3.

⁵³ See *Issues and Decision Memorandum for the Administrative Review of Top-of-the-Stove Stainless Steel Cooking Ware from the Republic of Korea (Korea); Final Results* (June 12, 2002) at Comment 5.

⁵⁴ See *Issues and Decision Memorandum for the Administrative Review of Antidumping Duty Order on Top-of-the-Stove Stainless Steel Cooking Ware from the Republic of Korea (Korea); Final Results* (February 14, 2003) at Comment 4.

one home market sale related to a transaction involving a combination of Korvan-produced and Korvan-purchased ferrovanadium. Rather, the two gross unit prices for the transaction should be averaged, and this single average gross unit price should be reported for the two sales listed in the home market sales database.

- The information on the record does not demonstrate that Korvan charged the customer one price for Korvan-produced ferrovanadium and another price for Korvan-purchased ferrovanadium. Korvan provided its customer for this sale with certain documentation indicating that it was a single sale of ferrovanadium,⁵⁵ and the customer paid for one combined shipment of ferrovanadium delivered on the same day.⁵⁶ Moreover, documentation demonstrates that the customer analyzed the shipment as a whole, as a single lot of ferrovanadium, regardless of the fact that it was composed of both Korvan-produced and Korvan-purchased ferrovanadium.
- Also, certain documentation reviewed at the Department's verification indicates this was a single sale at a single price.⁵⁷ Additionally, and contrary to Korvan's claim, the Department confirmed at verification that the "sale date and the shipping date for both the Korvan-produced and Korvan-purchased ferrovanadium are the same, amounting to a single shipment ... of ferrovanadium."⁵⁸

Respondent's Comments:

- The Department should reject petitioners' argument and continue to treat Korvan's home market sales of Korvan-produced and Korvan-purchased ferrovanadium reported in two different home market sales transactions as separate sales.⁵⁹
- At verification, the Department established that the prices and sales terms differed between the two home market sales at issue. Moreover, at verification, Korvan presented the basis for its reporting of two separate prices, and the Department properly verified and accepted that basis.⁶⁰ The sales verification report does not support Petitioners' assertion that the Department confirmed at verification that Korvan's reporting of separate sales made at two different times was "misleading and unsupported."⁶¹

Department's Position:

We disagree with Petitioners that Korvan did not charge the customer one price for Korvan-produced ferrovanadium and another price for Korvan-purchased ferrovanadium with respect to the sale at issue. As shown on the home market invoice for the sale in question,⁶² the "settlement details of Fe-V release" clearly demonstrate that Korvan assigned one per-unit price to one

⁵⁵ See Korvan's September 16 Supplemental Response at Exhibit SB-14.

⁵⁶ See Petitioners' Case Brief at 43, Korvan's September 16 Supplemental Response at 8-9, and the BPI Memorandum at 7.

⁵⁷ See Sales Verification Report at 18-19 and Exhibit 20, p.5 and the BPI Memorandum at 7-8.

⁵⁸ See Sales Verification Report at 19 and the BPI Memorandum at 8.

⁵⁹ See *id.*

⁶⁰ See Korvan's Rebuttal Brief at 18-19.

⁶¹ See Petitioners' Case Brief at 42-44.

⁶² See Korvan's Supplemental Questionnaire Response dated August 12, 2016, at Exhibit SB-7.

portion of the sale and a different per-unit price to another portion of the sale.⁶³ The value of each of these portions of this sale ties respectively to two different accounts, one for Korvan-produced ferrovanadium (account 40400) and another for Korvan-purchased ferrovanadium (account 40100).⁶⁴ Korvan explained, and the invoice shows, that different prices were assigned to the two line items⁶⁵ and that these assignments followed from the contractual obligations of Korvan's home market customer.⁶⁶ The fact that the sales price of each portion of the sale was calculated based on the same vanadium content does not indicate that Korvan charged the customer the same price for Korvan-produced ferrovanadium and Korvan-purchased ferrovanadium.

Moreover, the record does not demonstrate that Korvan physically commingled the Korvan-produced ferrovanadium and the Korvan-purchased ferrovanadium, or that it failed to differentiate between transactions involving the two products in its books and records. The accounting voucher confirms that the two different sales values from the settlement details were recorded in two different sales ledgers under two different accounting codes: one for Korvan-purchased ferrovanadium (accounting code 40100) and another for Korvan-produced ferrovanadium (accounting code 40400).⁶⁷ Moreover, Korvan's accounting records demonstrate that the sales revenue for Korvan-purchased ferrovanadium and the sales revenue for Korvan-produced ferrovanadium were recorded in two different accounts and can be traced from accounting ledgers to trial balances and the financial statements.⁶⁸ Accordingly, Korvan was able to trace separately its sales of Korvan-purchased ferrovanadium and Korvan-produced ferrovanadium through its accounting system from the invoice to the accounting records used to record the sales.⁶⁹ Additionally, the packing list⁷⁰ for the sales also contains two separate lines identifying the quantity of Korvan-purchased ferrovanadium and the quantity of Korvan-produced ferrovanadium that were sold in this transaction under this packing list. As verified by the Department, the inventories of Korvan-purchased ferrovanadium and Korvan-produced ferrovanadium were also kept separately, and Korvan was able to trace the inventory movement of Korvan-purchased ferrovanadium and Korvan-produced ferrovanadium through the accounting records up to the final sale.⁷¹

Thus, we disagree with Petitioners' claims regarding commingling. Specifically, we disagree with Petitioners' point that certain documentation (which contains BPI) indicates this was a single sale that should be viewed as having a single unit price.⁷² The home market customer was aware that the two different types of ferrovanadium were priced differently and were included on the same invoice.⁷³ In addition, Korvan's accounting system allows it to trace each part of the

⁶³ See Korvan's Supplemental Questionnaire Response dated September 16, 2016, at 9-10.

⁶⁴ See Korvan's Supplemental Questionnaire Response dated August 12, 2016, at Exhibit SB-7

⁶⁵ See BPI Memorandum at 8.

⁶⁶ See Korvan's Supplemental Questionnaire Response dated September 16, 2016, at 9-10.

⁶⁷ See Korvan's Supplemental Questionnaire Response dated August 12, 2016, at Exhibit SB-7

⁶⁸ See Korvan's Supplemental Questionnaire Response dated August 12, 2016, at Exhibit SB-2

⁶⁹ See Korvan's Supplemental Questionnaire Response dated August 12, 2016, at Exhibit SB-7

⁷⁰ See *id.*

⁷¹ See Sales Verification Report at 6, 13-14.

⁷² See BPI Memorandum at 9.

⁷³ See Korvan's Supplemental Questionnaire Response dated August 12, 2016, at Exhibit SB-7

total value of this sale separately to two different accounts in Korvan's accounting system. Also, we disagree with Petitioners that the customer's acceptance of certain documentation (which contains BPI) regarding the total quantity of the sales, which were made on the same day and recorded separately in Korvan's accounting system, serves as evidence that Korvan's sale of Korvan-purchased ferrovanadium and its sale of Korvan-produced ferrovanadium on that day were commingled.⁷⁴ As explained by Korvan,⁷⁵ "customers do not express a preference for Korvan-produced or purchased ferrovanadium," and the amounts billed in the invoices are calculated based on certain characteristics (involving BPI) of the merchandise.⁷⁶ However, the fact that the value of each portion of this sale, *i.e.*, the Korvan-purchased ferrovanadium portion and the Korvan-produced ferrovanadium portion, was calculated in the same manner, does not change the fact that Korvan was fully aware of which portion of this sale represented Korvan-purchased ferrovanadium and which portion represented Korvan-produced ferrovanadium; Korvan priced these two portions of the sale separately based on a pricing mechanism agreed to by Korvan and the customer and recorded the different portions of the sale in its accounting system in two different accounts.

Lastly, in addition to the reasons for not averaging the prices at issue that are identified above, averaging the prices would not be appropriate based on certain BPI regarding the sale.⁷⁷

Comment 4: Whether the Department Should Apply Its Standard Average-To-Average Method To Calculate the Weighted-Average Dumping Margin In The Final Determination

Respondent's Comments:

- Respondent argues that Korvan's situation is not like those situations in which the differential pricing analysis is normally applied.
- Respondent argues that the U.S. antidumping law requires that the Department take a case-by-case approach in determining whether significant price differences exist. Respondent argues that the Department should follow the SAA and "proceed on a case-by-case basis, because small differences may be significant in one industry or type of product, but not for another."⁷⁸
- In most past applications of the Department's differential pricing analysis, there has been a large number of customers, regions, or both. In the instant investigation, the number of both regions and customers is exceedingly small. According to respondent, in such a situation the Department's "one-size-fits-all" approach is not sufficient, and results in significant distortion of the results.

⁷⁴ See *id.*

⁷⁵ See Korvan's September 16 Supplemental Questionnaire Response at 5.

⁷⁶ See *id.* at 8 and the BPI Memorandum at 9-10.

⁷⁷ See BPI Memorandum at 10.

⁷⁸ See Uruguay Round Agreements, Statement of Administrative Action, H. Doc. 103-316(1), 103d Cong. 2d Sess. at 843 (Sept. 27, 1994) (SAA). We note that although Korvan repeatedly refers to the "APA" in referencing guidance to take a case-by-case approach, it appears Korvan has mistaken the abbreviation for the Statement of Administrative Action, *i.e.*, "SAA," with the abbreviation for the Administrative Procedures Act, *i.e.*, "APA." See Korvan's Case Brief at 12.

- Respondent claims that the Department in its *Preliminary Determination* applied the average-to-transaction method without taking into account whether the average-to-average comparison can account for the differences in prices.
- Respondent states that, if the Department continues to apply the average-to-transaction method in the final determination, it should not apply zeroing, because the World Trade Organization has established that the use of zeroing as part of an alternative comparison method based on the average-to-transaction method violates the World Trade Organization (“WTO”) Antidumping Agreement. Therefore, according to respondent, the Department should consider revising its preliminary analysis to decline the use of zeroing in its final determination.

Petitioner’s Comments:

- Petitioner states that Korvan presented no facts or analysis to support its assertion that, due to its “small customer base” and “low number of export regions,” use of the differential pricing analysis results in a distortion of the results.⁷⁹
- Petitioner claims that the facts on the record contradict Korvan’s assertion that its “small customer base” and “low number of export regions” precluded the Department from applying its differential pricing analysis. Petitioner points out that, in the *Preliminary Determination*, the Department demonstrated that Korvan’s data satisfied the threshold criteria for determining whether a respondent’s sales data can be evaluated under the Department’s differential pricing analysis, and that the application of the differential pricing analysis to Korvan’s data was necessary. Moreover, Petitioner asserts, because Korvan’s data were sufficient to constitute test groups and comparison groups for purposes of the analysis, the Department performed the Cohen’s *d* test in the first stage of the differential pricing analysis in its *Preliminary Determination*.⁸⁰
- Petitioner asserts that the Department’s differential pricing analysis revealed evidence of dumping that was masked when it used the average-to-average method to calculate the weighted-average dumping margin for Korvan. Petitioner points out that the Department demonstrated through the results of the differential pricing analysis that the use of the average-to-transaction method for Korvan is supported by the facts on the record and consistent with the Department’s normal practice.
- Petitioner disagrees with respondent’s assertion that the Department did not take into consideration whether the average-to-average method can account for the differences in prices and, instead, applied the average-to-transaction method. Petitioner points out that, contrary to respondent’s assertion, the Department conducted its meaningful differences analysis and determined that “the average-to-average method cannot appropriately account for such differences because the resulting weighted-average dumping margins move across the *de minimis* threshold when calculated using the average-to-average

⁷⁹ See Korvan’s Case Brief at 12.

⁸⁰ See *Preliminary Determination Decision Memo* at 10.

method.” Therefore, an alternative comparison method based on the average-to-transaction method was applied to all U.S. sales in the *Preliminary Determination*.⁸¹

- Petitioner claims that, on this issue, Korvan also did not present a reasonable justification for the Department to depart from its normal practice or reach a different conclusion with respect to Korvan in the final determination.
- Petitioner contends that Korvan’s argument regarding declining the use of zeroing while applying the average-to-transaction method was already rejected by the Department.
- Petitioner argues that the Department’s use of zeroing, including its use in conjunction with the average-to-transaction comparison method, has been affirmed as reasonable by the courts.⁸² Petitioner points out that, with respect to Korvan’s argument, the Department has previously considered and rejected the argument that the WTO Antidumping Agreement prohibits the application of the average-to-transaction method to all U.S. sales and the use of zeroing.⁸³
- Petitioner concludes that, for the reasons stated above, the Department should reject Korvan’s argument and continue to use the average-to-transaction comparison method, with zeroing, in its antidumping calculations for Korvan in the final determination.

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 differs significantly or explains why the A-to-A method or the transaction-to-transaction (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.⁸⁴ As explained in the *Preliminary Determination*, as well as in various other proceedings,⁸⁵ the Department’s differential pricing analysis is reasonable, including the use of the Cohen’s *d* test as a component in this analysis, and it is in no way contrary to the law.

Due to the makeup of Korvan’s customer base, the differential pricing analysis is not needed to account for the differences in purchasers and regions, and the Department should take a case-

⁸¹ See *Preliminary Determination Decision Memo* at 10-11 and Petitioner’s Rebuttal Brief at 4-5.

⁸² See *Apex Frozen Foods*, 144 F. Supp. 3d at 1334, citing *Corus Staal BV v. Dep’t of Commerce*, 259 F. Supp. 2d 1253, 1260-65 (2003) *aff’d*, 395 F.3d 1343, 1347 (Fed. Cir. 2005).

⁸³ See, e.g., *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 81 Fed. Reg. 53419 (August 12, 2016), and accompanying Issues and Decision Memorandum (“Hot-Rolled Steel from Korea”) at Comment 11.

⁸⁴ 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).

⁸⁵ See, e.g., *Welded Line Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015) (*Lipe Pipe from Korea*) and the accompanying Issues and Decision Memorandum at comment 1; *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 32937 (June 10, 2015) (*CWP from Korea*), and the accompanying Issues and Decision Memorandum at comments 1 and 2, and *Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 46647 (July 18, 2016) at comment 4.

by-case approach and apply its standard average-to-average method to calculate the margin for Korvan.

The Department agrees with Korvan's reference to the SAA, and the Department does follow the SAA's guidance that its analysis proceed on a case-by-case basis. The differential pricing analysis is exactly what allows the Department to take a case-by-case approach, as the results of our analysis are based on each respondent's own data. For example, the definition of "significant" in the Cohen's *d* test is calculated based on the pricing behavior for each individual respondent. Where this pricing behavior results in large variances in individual sale prices, then the difference in the average prices of the test and comparison groups must be large to be significant, whereas when the variances in the individual sale prices are smaller, then a smaller difference in the average prices of the two groups will be significant.

Furthermore, in the *Preliminary Determination*, the Department's explained that:

Interested parties may present arguments and justifications in relation to the above-described differential pricing analysis used in this preliminary determination, including arguments for modifying the group definitions used in this proceeding.⁸⁶

Besides Korvan's claims in its case brief that the fact that its U.S. sales are to a limited number of customers and regions and this has distorted the results of the Department's differential pricing analysis, Korvan has provided no factual information on the record to demonstrate the claimed distortion. In other proceedings where a respondent has presented factual evidence to support a change in the Department's differential pricing analysis, the Department has changed the normal approach as described in the *Preliminary Determination*.⁸⁷ However, in this investigation, Korvan has provided no such support for its claim and, therefore, the Department finds Korvan's argument meritless.

The Department applied the average-to-transaction method without taking into consideration whether the average-to-average comparison can account for the differences in prices.

The Department disagrees with Korvan's argument that it did not take into consideration whether the average-to-average method can account for the differences in prices and instead applied the average-to-transaction method. Contrary to respondent's assertion, the Department performed the meaningful differences analysis and determined that "the average-to-average method cannot appropriately account for such differences because the resulting weighted-average dumping margins move across the *de minimis* threshold when calculated using the average-to-average method."⁸⁸ Additionally, the Department has fully explained the purpose behind the "meaningful

⁸⁶ PDM at 11.

⁸⁷ {Copper pipe and tube from China, Pasta from Italy}.

⁸⁸ See Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance "Decision Memorandum for the Preliminary Determination in the Less-Than-Fair Value Investigation of Ferrovandium from the Republic of Korea" ("Preliminary Decision Memorandum"), at 11.

difference” test in other final determinations.⁸⁹ 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.⁹⁰ Because Korvan has provided no substance to its argument that the Department failed to provide a reasoned explanation, Korvan’s argument is meritless.

If the Department decides not to apply a case-by-case approach and continues to apply the average-to-transaction method in the final determination, it should not apply zeroing because the WTO has established that zeroing violates the Antidumping Agreement.

The Department disagrees with Korvan. 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.⁹¹ In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.⁹² 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.⁹³

To date, the United States has fully complied with all adverse panel and Appellate Body reports adopted by the Dispute Settlement Body with regard to Article 2.4.2 of the Antidumping Agreement. With regard to the A-to-T method, specifically, as an alternative comparison method and the use of zeroing 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 section 123 or section 129 of the URAA.

Comment 5: Whether the Department Made Certain Ministerial Errors in its Calculations

Respondent’s Comments:

- The Department failed to keep the variable identifying the quarter in the comparison market (“CM”) weighted-average net price database and did not initialize and refer to the SAS macro variable for the CM quarter accurately in the concordance SAS macro. The Department should correct those errors.

⁸⁹ See *Certain Hot-Rolled Steel Flat Products from Japan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 53409 (August 12, 2016), and the accompanying Issues and Decisions Memorandum at comment 8.

⁹⁰ See *Apex Frozen Foods* at 38-45; see generally *Samsung Electronics Co. v. United States*, Slip Op. 15-158 (CIT June 12, 2015) (*Samsung*) (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 (*Samsung* also involves an investigation where the two statutory requirements are mandatory)).

⁹¹ 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).

⁹² See, e.g., 19 U.S.C. § 3533, 3538 (sections 123 and 129 of the URAA).

⁹³ See, e.g., 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary).

Petitioners' Comments:

- The SAS programming language relied upon by the Department used an incorrect average net price in the cost recovery test. The Department should correct this error.

Department's Position:

We agree with Petitioners. For the final determination, the Department corrected its revised programming language regarding the cost recovery test in a post-*Preliminary Analysis* memorandum dealing with the implementation of quarterly cost⁹⁴ to use the appropriate average net price.⁹⁵

With respect to respondent's comment, the Department kept the variable identifying the quarter in the CM weighted-average net price database and initialized and referred to the SAS macro variable for the CM quarter accurately in the concordance SAS macro in its post-preliminary calculation⁹⁶ and will continue using that programming language for the final determination.

Comment 6: General and Administrative (G&A) Expenses

Petitioners' Comments:

- In the *Preliminary Determination*, the Department excluded the reversal of retirement benefits, which was an offset to the G&A expenses.
- The Department's normal practice is to disallow income offsets to current year expenses for adjustments associated with prior years.⁹⁷
- The reversal of retirement benefit is gains associated with a reversal of prior year severance expenses and should not be used as an offset to current year G&A expenses.

Respondent's Comments:

- Korvan changed its retirement funding policy during the fiscal year 2015, and this policy change prompted a retroactive adjustment of retirement funding liability. This adjustment was recorded in the fiscal year 2015, and the Department should allow this amount as an

⁹⁴ See Memorandum to the File from Karine Gziryan, International Trade Compliance Analyst, AD/CVD Operations, Office IV, Enforcement and Compliance, Case: Investigation of Ferrovandium from the Republic of Korea, Subject: SAS Programming Error in the Preliminary Determination (December 23, 2016).

⁹⁵ See Memorandum to the File, Through Howard Smith, Program Manager, AD/CVD Operations, Office IV, from Karine Gziryan, AD/CVD Operations, Office IV, regarding "Analysis Memorandum for the Final Determination of the Antidumping Duty Investigation of Ferrovandium from the Republic of Korea: Korvan, Ind., Co." ("Final Analysis Memorandum"), dated concurrently with this memorandum at 2.

⁹⁶ See Post-Preliminary Memorandum regarding SAS macro error dated December 23, 2016.

⁹⁷ See *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 8043 (February 17, 2016) and accompanying Issues and Decision Memorandum at Comment 2 ("*Pasta from Italy II*") and *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 Comment 12 ("*Wire Rod from Canada*").

offset to Korvan's G&A expenses.

Department's Position:

We agree with Petitioners that the reversal of retirement benefit should not be allowed as an offset to the G&A expenses. We generally do not consider it appropriate to reduce current period expenses by a correction of over-estimated costs associated with non-recurring provisions from prior years.⁹⁸ The subsequent year's reversal of these estimated costs does not represent revenue or reduced operating costs in the year of reversal. Rather, they represent a correction of an over-estimate which was made in prior years. During the fiscal year 2015, Korvan changed its retirement funding policy, which prompted a non-recurring retroactive adjustment of the retirement funding liability. The reversal of retirement benefit represented the gains on the retroactive adjustment to the retirement funding liability. Because the reversal of retirement benefit was a non-recurring prior period provision and does not relate to costs in the current investigation period, we continue to exclude this item from Korvan's G&A expense ratio calculation.

Comment 7: Financial Expenses

Petitioners' Comments:

- In the *Preliminary Determination*, the Department included long-term interest expenses in the numerator of the financial expense ratio calculation and excluded the gain on retirement pensions from the short-term interest income calculation. The Department should continue to make these adjustments for the final determination.

Respondent's Comments:

- The gain on retirement pensions was equivalent to interest income accrued on pension funds, and this item should be included in the financial expense ratio calculation as an interest income offset.

Department's Position:

We agree with Petitioners. The Department's practice is to include the entire borrowing experience of the respondent company in the calculation of the financial expense ratio.⁹⁹ As such, we continue to include all of Korvan's interest expense in the calculation of the financial expense ratio for the final determination. Further, it is the Department's well-established practice to allow a respondent to offset financial expenses with short-term interest income

⁹⁸ See also *Pasta from Italy II* 81 FR 8043 (February 17, 2016) and accompanying Issues and Decision Memorandum at Comment 2; see also *Stainless Steel Sheet and Strip in coils from Mexico: Final Results of Antidumping Duty Administrative Review*, 74 FR 6365 (February 9, 2009) and accompanying Issues and Decision Memorandum at Comment 7; *Stainless Steel Bar from Brazil: Final Results of Antidumping Duty Administrative Review*, 74 FR 33995 (July 14, 2009), and accompanying Issues and Decision Memorandum at Comment 3.

⁹⁹ See *Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes from Canada*, 67 FR 8781 (February 26, 2002) and accompanying Issues and Decision Memorandum at Comment 25.

generated from a company's current assets and working-capital accounts.¹⁰⁰ In this case, the gain on the retirement pension at issue was earned on Korvan's defined retirement pension benefit plan funds. While the funds deposited in the defined retirement pension benefit plan may incur earnings, these funds were restricted for employees' retirement pension benefit. As such, we do not consider these compensating funds to be liquid working capital reserves which would be readily available for Korvan to meet its daily cash requirements. Also, there is no evidence that the gain on retirement pension was short term in nature. Therefore, for the final results, we continue to disallow the gain on retirement pension as a short-term interest income offset in Korvan's financial expense ratio calculation.

Comment 8: Whether to Continue to Apply a Quarterly Cost Methodology

Petitioners' Comments:

- In the *Preliminary Determination*, the Department used the alternative cost averaging period methodology (*i.e.*, quarterly cost) because it determined that Korvan experienced significant cost changes attributable to the price volatility of vanadium pentoxide (*i.e.*, raw material input) and reasonable linkage existed between Korvan's quarterly costs and sales prices during the POI.¹⁰¹
- While the Department found that Korvan's cost data met the significant cost change requirement of the 25 percent threshold, the distortions reflected in the recorded raw material costs render the Department's quarterly cost analysis unreliable. Also, the distortions reflected in the recorded sales prices render any perceived linkage between changes in Korvan's quarterly costs and its sales pricing practices meaningless.
- Due to the unique facts of this case, the type of analysis that the Department performed is not a sufficient basis for the Department to depart from the POI annual average cost calculation methodology.
- For the highest sales volume product matching control number (CONNUM) in the home and U.S. markets, changes in the quarterly cost of manufacturing (COM) and sales prices didn't move in the same direction for one of the quarters during the POI. Also, for each quarter, the proportion of changes in the COM and the proportion of changes in the sales prices did not mirror each other. Because Korvan's quarterly COM and sales prices did not move consistently together, there was not a linkage between the quarterly COM and the sales prices.¹⁰²

¹⁰⁰ See *Certain Frozen Warm Water Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47551 (September 16, 2009) and accompanying Issues and Decision Memorandum at Comment 7.

¹⁰¹ See *Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review*, 73 FR 75398 (December 11, 2008) and accompanying Issues and Decision Memorandum at Comment 4 ("*SSPC from Belgium*").

¹⁰² See *Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review*, 75 FR 6352 (February 9, 2010) and accompanying Issues and Decision Memorandum at Comment 5 ("*Pasta from Italy*"); *Pastificio Lucio Garofalo, SpA v. United States*, 783 F. Supp. 2d 1230 (CIT 2011) at 1236; *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Administrative Review*, 75 FR 13490 (March 22, 2010) and accompanying Issues and Decision Memorandum at Comment 3 ("*Corrosion-Resistant Steel from Korea*"); *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, Results of Redetermination Pursuant to Remand, Union Steel Manufacturing Co., Ltd. v. United*

- The Department stated that various factors may affect the timing relationship between the purchase of the raw materials, the production of a product, and its subsequent sales.¹⁰³ For these reasons, it is necessary for a respondent to provide evidence on the record of a direct linkage between quarterly costs and sales prices before the Department considers using a cost averaging period that does not extend throughout the entire POI/period of review (POR).¹⁰⁴ The facts of this case demonstrate that Korvan's average production costs during each quarter do not accurately relate to the sales that occurred during the same period.
- There are two primary factors in this case which illustrate that relying on quarterly costs leads to distorted and inaccurate results.
- The first factor is time lag between recording raw material purchases (*i.e.*, vanadium pentoxide) and recording price and duty settlements related to those purchases. Specifically, Korvan's recorded raw material costs in a particular quarter of the POI included provisional raw material costs of that particular quarter (subject to later price settlement) and price and duty settlements related to raw material purchases in prior quarters. Because the actual raw material costs are determined based on price and duty settlements that cross over quarters, isolating Korvan's costs per its accounting records by each quarter is not an appropriate measure of raw material costs that Korvan actually incurred in each quarter.
- The time lag for recording price and duty settlements across quarters has a significant impact on Korvan's quarterly costs. Thus, it results in improper quarterly comparisons between the home market sales prices and the cost of production (COP) for purposes of determining sales below cost.
- The second factor is the time lag between recording of Korvan's U.S. sales to a main U.S. customer and recording of price settlements related to those U.S. sales. These sales accounted for significant quantities of U.S. sales and result in improper comparisons between the quarterly home market and the U.S. sales.
- Specifically, while significant U.S. sales included the post-sales price settlements, there were no post-sale price settlements for Korvan's home market sales. Further, substantial amounts of these U.S. post-sale price settlements were recorded in a different quarter from the quarter of the reported date of U.S. sales. Because Korvan did not report any post-sale price settlements on its home market sales, this results in improper comparisons between the home market and the U.S. market sales.
- There is no evidence that Korvan revised the prices for these U.S. sales in response to changes in raw material costs. Consequently, it would be unreasonable to conclude that there is a linkage between the prices for these U.S. sales and the changes in raw material costs. Thus, the Department should rely on its normal POI annual average cost calculation methodology for the final determination.

States, Consol Court No. 10-00106, Slip p. 14-27 (CIT March 4, 2014), (August 1, 2014) (affirmed in *Union Steel Manufacturing Co., Ltd. v. United States*, 190 F. Supp. 3d 1326 (CIT 2016)); and *SSPC from Belgium and Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (January 24, 2006) and accompanying Issues and Decision Memorandum at Comment 5 ("Wire Rod from Canada").

¹⁰³ See *Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation/ Period of Review that May Require Using Shorter Cost Averaging Period; Request for Comment*, 73 FR 26364 (May 9, 2008).

¹⁰⁴ See *id.*

Respondent's Comments:

- The Department properly used the alternative cost averaging period methodology in the *Preliminary Determination*, because Korvan experienced significant cost changes and a reasonable linkage exists between quarterly costs and sales prices during the POI.
- The linkage standard does not require direct traceability between specific sales and specific production costs. Rather, it relies on whether there are elements which would indicate a reasonable correlation between the underlying costs and the final sales prices levied by the company.¹⁰⁵ Thus, the Department should continue to use the quarterly cost methodology for the final determination.

Department's Position:

In the *Preliminary Determination*, we relied on the quarterly cost methodology in calculating the dumping margin for Korvan, finding significant cost changes in COM as well as reasonable linkage between costs and sales prices. For the final determination, we continued to use the quarterly cost methodology for Korvan. However, we adjusted Korvan's reported raw material costs for each reported CONNUM to account for the timing differences between the provisional purchase price and the final adjustment to that price. In determining whether to deviate from our normal methodology of calculating an annual weighted-average cost, we evaluate the case-specific record evidence using two primary factors: (1) whether the change in COM recognized by the respondent during the POR is deemed significant (*i.e.*, greater than 25 percent); and (2) whether the record evidence indicates that sales made during the shorter averaging periods were reasonably linked with the COM during the same shorter averaging periods.¹⁰⁶

In the normal course of business, Korvan purchases raw materials (*i.e.*, vanadium pentoxide) based on a spot or long-term contract, and the purchase price set forth in a contract is based on the future market price at an agreed upon date and price published by the London Metal Bulletin (LMB) or Ryan's Notes (RN) (*i.e.*, the purchase price quotation). As such, once a supplier ships raw materials, Korvan receives a provisional invoice and records the provisional purchase amount in the "materials in transit" inventory account. Upon receipt of the raw material shipment, Korvan transfers the provisional amount recorded in the "materials in transit" account to the raw material inventory account. Subsequently, after the purchase price quotation period, Korvan receives a final invoice for the price difference between the provisional and the final purchase price. Based on this final invoice, Korvan records the raw material purchase price settlement directly to the raw material inventory account to adjust the recorded provisional amount in the inventory ledger, to the final purchase price. As such, Korvan explained that it is common that the provisional raw material purchase amount and the related price settlements

¹⁰⁵ See *Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 74 FR 6365 (February 9, 2009) and accompanying Issues and Decision Memorandum at Comment 5 ("SSSSC from Mexico I") and SSPC from Belgium.

¹⁰⁶ See *Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 75 FR 6627 (February 10, 2010) and accompanying Issues and Decision Memorandum at Comment 6 ("SSSSC from Mexico II") and SSPC from Belgium.

could be recorded in different quarters depending on the purchase price quotation period in the contract (*i.e.*, the timing difference). Consequently, the raw material costs recorded in Korvan's normal books and records in each quarter of the POI consisted of the provisional raw material costs for purchases initiated in that particular quarter (subject to later price settlement) and the price settlements related to raw material purchases from prior months and quarters. Further, Korvan recorded small amounts of duty settlements in a similar manner during the POI.¹⁰⁷

Section 773(f)(1)(A) of the Act instructs the Department to calculate costs based on a respondent's normal books and records if they are kept in accordance with home country generally accepted accounting principles (GAAP) and reasonably reflect the costs associated with the production and sale of the merchandise. While Korvan's normal books and records are kept in accordance with Korean GAAP, we find that Korvan's recorded raw material costs do not reasonably reflect the actual production costs of the merchandise in each quarter of the POI because of the timing differences associated with recording raw material purchases and the final settlements. Consequently, we agree with Petitioners that relying on Korvan's costs as recorded in its monthly accounting records for use in the quarterly cost analysis and methodology is inappropriate.

Korvan provided its transaction-specific raw material purchases and the related price and duty settlements for all vanadium pentoxide purchases during the POI. Using this information, we were able to match-up each raw material purchase with the related transaction-specific price and duty settlements so that each final raw material price recorded in a given quarter reflects the actual raw material costs incurred for that quarter. Thus, for the final determination, we were able to calculate accurate quarterly raw material costs by eliminating the timing impact attributable to Korvan's raw material purchases and subsequent final price settlements.¹⁰⁸

After eliminating the timing impact reflected in the reported raw material costs, we analyzed Korvan's cost data to determine whether the change in COM during the POI was deemed significant (*i.e.*, greater than 25 percent). Specifically, we analyzed the significance of the change in quarterly COM for the merchandise under consideration, between the quarter with the highest COM and the quarter with the lowest COM divided by the lowest quarter COM.¹⁰⁹ Based on this analysis, we found that the difference between the low quarterly average COM and the high quarterly average COM exceeded the 25 percent threshold.¹¹⁰

¹⁰⁷ See Memorandum to the File from Ji Young Oh, Senior Accountant, through Neal M. Halper, Director, Office of Accounting, dated December 20, 2016, entitled, "Verification of the Cost Response of Korvan Ind. Co., Ltd. in the Antidumping Duty Less Than Fair Value Investigation of Ferrovanadium from Korea" ("Cost Verification Report") at pages 14-15.

¹⁰⁸ See Memorandum to Neal M. Halper, Director, Office of Accounting from Ji Young Oh, Senior Accountant, dated March 16, 2017, entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Korvan Ind. Co., Ltd." ("Final Determination Cost Calculation Memorandum") at attachments 1-3

¹⁰⁹ The Department normally performs the cost change analysis using the five highest-sales volume control numbers (CONNUMs) sold in the home and U.S. markets. However, during the POI, Korvan only produced three CONNUMs and sold only one of those CONNUM in the U.S. market. Further, the CONNUM sold in the U.S. market was also the highest-sales volume CONNUM sold in the home market. Thus, consistent with the *Preliminary Determination*, the significant cost change analysis was based on only one CONNUM.

¹¹⁰ See Final Determination Cost Calculation Memorandum at attachment 4.

If we find changes in costs to be significant in a given investigation or administrative review, we subsequently evaluate whether there is evidence of linkage between the cost changes and the sales prices during the shorter cost periods within the POI/POR. As explained in *SSPC from Belgium*, *Pasta from Italy*, and *Corrosion-Resistant Steel from Korea*, our definition of linkage does not require direct traceability between specific sales and their specific production costs, but rather relies on whether there are elements which would indicate a reasonably positive correlation between the underlying costs and the final sales prices charged by a company.¹¹¹ We acknowledge that being able to link sales prices and costs reasonably during a shorter cost period is important in deciding whether to depart from our normal annual POI average cost methodology. However, we believe that requiring too strict a standard for linkage would unreasonably preclude this remedy for products where there is no pricing mechanism in place and it may be very difficult to precisely link production costs to specific sales. Also, we disagree with Petitioners that there must be parity in the magnitude of the changes in prices and costs for the Department to find linkage. There are so many factors that affect pricing decisions from customer to customer, day to day, that the expectation that prices relative to costs should be in exact proportion throughout the year is unreasonable. It is for this reason that we have an established practice that sales prices and costs need only be reasonably correlated for there to be linkage.

For Korvan, we evaluated whether the sales prices during the shorter cost averaging period were reasonably correlated with the COM during the same period. As stated above, during the POI, Korvan sold only one CONNUM in the U.S. market, and the same CONNUM was also the highest sales volume CONNUM sold in the home market. Thus, the linkage analysis was based on this CONNUM. Specifically, we compared the quarterly average prices and the recalculated quarterly average COM and found that the quarterly sales prices and COM moved in the same direction for all quarters and the slope lines for the quarterly sales prices and costs trended consistently throughout the POI.¹¹² Because the prices and costs appear to be reasonably correlated, we determined that linkage between quarterly costs and sales prices existed during the POI.

Additionally, we do not find Petitioners' argument regarding improper matching due to out-of-quarter post-U.S. sales price settlements to be a compelling reason for not relying on quarterly costs. First, the Department's practice, in investigations, is to determine the universe of sales for matching purposes based on the date of sale rather than the date of post-sale billing adjustments. We are following that practice in applying the quarterly cost methodology here. Second, Petitioners have not demonstrated that the out-of-quarter post-U.S. sales price settlements resulted in distortive matching under the quarterly cost methodology, particularly when approximately half of the examples of such price settlements provided by Petitioners involve a relatively limited timing difference between the end of the quarter and the price settlement date. Lastly, the record shows that out of matching period post-U.S. sales price settlements would also exist even if the matching period were the POI, rather than the quarters during the POI.

¹¹¹ *SSPC from Belgium*, 73 FR at 75398 and accompanying Issues and Decision Memorandum at Comment 4; *Pasta from Italy*, 75 FR at 6352 and accompanying Issues and Decision Memorandum at Comment 5; *Corrosion-Resistant Steel from Korea*, 75 FR at 13490 and accompanying Issues and Decision Memorandum at Comment 3.

¹¹² See Final Determination Cost Calculation Memo at attachments 5 and 6.

Consequently, for the final determination, we continued to use the quarterly cost methodology for Korvan. However, as explained above, we find that the reported quarterly raw material costs, which are based on the amounts recorded in Korvan's normal books and records, do not reasonably reflect the costs associated with producing the merchandise under consideration in the same quarter.

Thus, for the final determination, we adjusted Korvan's reported quarterly raw material costs for each reported CONNUM to reflect the actual raw material costs incurred for that quarter.

VI. RECOMMENDATION

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



Agree

Disagree

3/16/2017

X *Ronald K. Lorentzen*

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance