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August 30, 2017

**MEMORANDUM TO:** Gary Taverman  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations,  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance

**FROM:** James Maeder  
Senior Director  
performing the duties of Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Issues and Decision Memorandum for the Final Results of  
Antidumping Duty Administrative Review of Certain Cut-to-  
Length Carbon-Quality Steel Plate Products from the Republic of  
Korea; 2015-2016

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### **Summary**

We analyzed the comments filed in the administrative review of the antidumping duty order on certain cut-to-length carbon-quality steel plate products (CTL plate) from the Republic of Korea (Korea) for the period of review (POR) February 1, 2015, through January 31, 2016. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a complete list of the issues for which we have received comments and rebuttal comments from the interested parties:

Comment 1: Differential Pricing

#### **Dongkuk Steel Mill Co., Ltd. (DSM)**

Comment 2: Major-Input Rule

Comment 3: Cost Differences Not Associated With Physical Characteristics

#### **Hyundai Steel Company (Hyundai Steel)**

Comment 4: Cost of Prime Products

Comment 5: Affiliated-Party Inputs

Comment 6: Overrun Sales

Comment 7: Marine Insurance



## Samsung C&T Corporation (Samsung)

### Comment 8: Reviewable Entries

#### **Background**

On March 3, 2017, the Department of Commerce (the Department) published the preliminary results of this review.<sup>1</sup> We invited interested parties to comment on the *Preliminary Results*. We received case and rebuttal briefs from interested parties.<sup>2</sup> The current due date for the final results of this review is August 30, 2017.<sup>3</sup>

#### **Scope of the Order**

The products covered by the antidumping duty order are certain hot-rolled carbon-quality steel: (1) universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, and of a nominal or actual thickness of not less than 4 mm, which are cut-to length (not in coils) and without patterns in relief), of iron or non-alloy quality steel; and (2) flat-rolled products, hot-rolled, of a nominal or actual thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are cut-to-length (not in coils). Steel products included in the scope of the order are of rectangular, square, circular, or other shape and of rectangular or non-rectangular cross section where such non-rectangular cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been “worked after rolling”) – for example, products which have been beveled or rounded at the edges. Steel products that meet the noted physical characteristics that are painted, varnished, or coated with plastic or other non-metallic substances are included within the scope. Also, specifically included in the scope of the order are high strength, low alloy (HSLA) steels. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. Steel products included in the scope, regardless of Harmonized Tariff Schedule of the United States (HTSUS) definitions, are products in which: (1) iron predominates, by weight, over each of the other contained elements, (2) the carbon content is two percent or less, by weight, and (3) none of the elements listed below is equal to or exceeds the quantity, by weight, respectively indicated: 1.80 percent of manganese, or 1.50 percent of silicon, or 1.00 percent of copper, or 0.50 percent of aluminum, or 1.25 percent of chromium, or 0.30 percent of cobalt, or 0.40 percent of lead, or 1.25 percent of nickel, or 0.30 percent of tungsten, or 0.10 percent of molybdenum, or 0.10 percent of niobium, or 0.41 percent of titanium, or 0.15 percent of vanadium, or 0.15 percent zirconium. All products that meet the written physical description, and in which the chemistry quantities do not equal or exceed any one of the levels listed above, are within the scope of the order unless otherwise specifically excluded. The following products are specifically excluded from the order: (1) products clad, plated, or coated with metal, whether

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<sup>1</sup> See *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 12431 (March 3, 2017) (*Preliminary Results*).

<sup>2</sup> See the case briefs from Nucor Corporation (Nucor) and Hyundai Steel dated April 3, 2017, the redacted case brief from Samsung dated April 7, 2017, and the rebuttal briefs from Nucor, DSM, and Hyundai Steel dated April 10, 2017.

<sup>3</sup> See the Memorandum, “Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,” dated June 30, 2017.

or not painted, varnished or coated with plastic or other non-metallic substances; (2) SAE grades (formerly AISI grades) of series 2300 and above; (3) products made to ASTM A710 and A736 or their proprietary equivalents; (4) abrasion-resistant steels (*i.e.*, USS AR 400, USS AR 500); (5) products made to ASTM A202, A225, A514 grade S, A517 grade S, or their proprietary equivalents; (6) ball bearing steels; (7) tool steels; and (8) silicon manganese steel or silicon electric steel.

Imports of steel plate are currently classified in the HTSUS under subheadings 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7225.40.3050, 7225.40.7000, 7225.50.6000, 7225.99.0090, 7226.91.5000, 7226.91.7000, 7226.91.8000, and 7226.99.0000. The HTSUS subheadings are provided for convenience and customs purposes. The written description of the merchandise covered by the order is dispositive.

### **Rates for Respondents Not Selected for Individual Examination**

For the respondents not selected for individual examination, *i.e.*, BDP International, Bookuk Steel Co., Ltd., Samsung C&T Engineering & Construction Group, Samsung C&T Trading and Investment Group, and Sung Jin Steel Co., Ltd., we used the same calculation methodology we used in the *Preliminary Results*.<sup>4</sup> The margin change to DSM resulted in a margin change for the respondents not selected for individual examination for the final results of this review. The final rate for these five non-selected respondents is 2.03 percent.

### **Discussion of the Issues**

#### **Comment 1: Differential Pricing**

Hyundai Steel argues that the Department should not conduct a differential pricing analysis for the final results of this administrative review. Hyundai Steel asserts that the Department's test does not establish that a "pattern" of price differences exists. To the contrary, Hyundai Steel claims, the Department's statistical test simply measures price variations measured against arbitrary statistical benchmarks. According to Hyundai Steel, the Department has not identified or described any particular "pattern" with respect to Hyundai Steel's U.S. pricing, as required under section 777A(d)(1)(B)(i) of Tariff Act of 1930, as amended (the Act). Having failed to establish that a "pattern" of price differences exists, Hyundai Steel avers, the Department cannot resort to alternate calculations, let alone zeroing.

Moreover, Hyundai Steel contends, the Department fails to recognize that the differences in margins it identifies are not the result of the difference between the average-to-average (A-A) and the average-to-transaction (A-T) methodology; the differences are solely attributable to zeroing. According to Hyundai Steel, had the Department not applied zeroing under any alternative, Hyundai Steel's resulting margin would have been *de minimis*. Hyundai Steel alleges that the Department's meaningful difference test as applied to Hyundai Steel is not a measure of whether the comparison methodologies yield meaningfully different results but only

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<sup>4</sup> See *Preliminary Results* and accompanying Preliminary Decision Memorandum at 3-4.

measures the effect of introducing zeroing to the calculations.

Citing *US-Washers (Korea)*,<sup>5</sup> Hyundai Steel argues that it remains unlawful to use the “zeroing” methodology when making A-T comparisons, whether based on a finding of differential pricing, because this practice contravenes the Department’s obligations under the WTO Antidumping Agreement.<sup>6</sup> Hyundai Steel contends that Article 2.4.2 of the WTO Antidumping Agreement prohibits the Department from calculating the dumping margin by applying the A-T methodology to all U.S. sales when it finds that differential pricing exists, not just to those sales where differential pricing is found to have occurred. Hyundai Steel asserts that the Department has employed Article 2.4.2 in a manner that extends far beyond its intended purpose. Hyundai Steel claims that the plain language of Article 2.4.2 compels the conclusion that the Department can apply its A-T methodology only to those U.S. sales that it finds to have been targeted.

Hyundai Steel also argues that the Department’s current interpretation of the statute to allow it to apply the A-T comparison methodology to all transactions, not just those transactions where differential pricing is found, is equally defective under U.S. law. Claiming that the current practice was first expressed in *PRCBs from Taiwan*,<sup>7</sup> Hyundai Steel alleges that the Department provided no rationale for its reversal of its prior interpretation that the A-T comparison method would only be used for differential pricing transactions.

Hyundai Steel argues that the Department may not apply “zeroing” to non-targeted transactions. Citing *US- Lumber (Canada)*, Hyundai Steel contends that, even assuming that the Department can employ the A-T comparison methodology to all transactions in an investigation, it still may not employ zeroing in conjunction with this methodology.<sup>8</sup> Hyundai Steel claims that Article 2.4.2 of the WTO Antidumping Agreement does not state that an administering authority is justified in zeroing when it finds differential pricing; rather, it says that a finding of differential pricing authorizes the administering authority to use the A-T comparison methodology. The relevant issue, according to Hyundai Steel, is whether the Appellate Body’s decisions finding zeroing to be impermissible allow an exception where the A-T methodology is used. To the contrary, Hyundai Steel contends, the Appellate Body has ruled that it is impermissible to use zeroing in the A-T methodology, just as in the A-A and transaction-to-transaction (T-T) methodologies.

Nucor argues that the Department should continue to apply its differential pricing analysis and continue to use the A-T method for the final margin calculation. Nucor contends that the Department has previously considered and rejected all these arguments in prior cases. Furthermore, Nucor asserts, WTO decisions have no effect on U.S. law unless and until they are adopted under the proper statutory scheme. Nucor claims that, even if the United States had

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<sup>5</sup> See *United States - Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, Appellate Body Report, WT/DS464/AB/R (Sept. 7, 2016), at para. 5.43 (*US-Washers (Korea)*).

<sup>6</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO Antidumping Agreement).

<sup>7</sup> See *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010) (*PRCBs from Taiwan*), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>8</sup> See *United States – Final Dumping Determination on Softwood Lumber from Canada Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW (Sept. 1, 2006) (*US- Lumber (Canada)*).

changed its practice regarding differential pricing in response to a WTO ruling, application would only apply going forward and not apply to this case.

Nucor contends that the Department applied its differential pricing methodology consistent with the statute. Nucor asserts that the statute only requires that the Department meet two criteria in order to apply the A-T methodology: 1) there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time; and (2) the administering authority explains why such differences cannot be taken into account using one of the standard comparison methodologies. In this case, Nucor concludes, both criteria have been satisfied and, therefore, the Department's application of the alternative comparison methodology is in accordance with the statute.

**Department's Position:** We disagree with Hyundai Steel. In the *Preliminary Determination*, we adhered to our standard differential pricing analysis.<sup>9</sup> Section 777A(d)(1)(B)(i) and (ii) of the Act permit the Department to compare weighted averaged normal values (NV) to individual U.S. transactions where (1) "there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time,"<sup>10</sup> and where the "administering authority explains why such differences cannot be taken into account" using the A-A method.<sup>11</sup> As we noted in the Preliminary Decision Memorandum, pursuant to 19 CFR 351.414(c)(1) and section 777A(d)(1)(B)(i) of the Act, the Department's practice is to apply a "differential pricing" analysis which determines whether a pattern of price differences exist.<sup>12</sup> The differential pricing analysis (including application of the Cohen's *d* test) that we employed in this review has been consistently applied by the Department in recent investigations.<sup>13</sup> Moreover, as we noted in the Preliminary Decision Memorandum, because 95.29 percent of Hyundai Steel's U.S. sales passed the Cohen's *d* test, our use of the A-T method for Hyundai Steel is consistent with our standard practice.<sup>14</sup>

The application of the A-T method to all U.S. sales reported by Hyundai Steel is not defective under U.S. law. Neither the statute nor the SAA<sup>15</sup> provides any guidance in determining how to apply the A-T method once the requirements of section 777A(d)(1)(B)(i) and (ii) of the Act have been satisfied. Accordingly, we have reasonably created a framework to determine how the A-T method may be considered as an alternative to the standard A-A method based on the extent of

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<sup>9</sup> See *Preliminary Results* and accompanying Preliminary Decision Memorandum at 5-7.

<sup>10</sup> See section 777A(d)(1)(B)(i) of the Act.

<sup>11</sup> See section 777A(d)(1)(B)(ii) of the Act.

<sup>12</sup> See *Preliminary Results* and accompanying Preliminary Decision Memorandum at 9.

<sup>13</sup> See, e.g., *Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013); *Steel Concrete Reinforcing Bar from Mexico: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 79 FR 54967 (September 15, 2014); and *Welded Line Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 80 FR 61362 (October 13, 2015).

<sup>14</sup> See *Certain Carbon and Alloy Steel Cut-To-Length Plate from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination*, 82 FR 16369 (April 4, 2017), and accompanying Issues and Decision Memorandum at Comment 1, where we addressed the same issues.

<sup>15</sup> See Uruguay Round Agreement Act, Statement of Administrative Action, H.R. Doc. No. 103-316 vol. 1 at 842 (1994), reprinted in 1994 USCCAN 4040, 4717 (SAA).

the pattern of prices that differ significantly as identified with the Cohen's *d* test.<sup>16</sup> The U.S. Court of Appeals for the Federal Circuit (CAFC) has recently upheld our practice.<sup>17</sup> As stated in the *Preliminary Results*, the purpose of the Cohen's *d* test is "to evaluate the extent to which the prices to the particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise."<sup>18</sup>

When 66 percent or more of the value of a respondent's U.S. sales are found to establish a pattern of prices that differ significantly, then we find that the extent of these price differences throughout the pricing behavior of the respondent does not permit the segregation of this pricing behavior which constitutes the identified pattern of prices that differ significantly from that which does not. Accordingly, we determine that considering the application of the A-T method to all U.S. sales to be reasonable. Further, when 33 percent or less of the value of a respondent's U.S. sales constitute the identified pattern of prices that differ significantly, then we consider the extent of this pattern not to be significant and do not consider the application of the A-T method as an alternative comparison method to be appropriate. When between 33 percent and 66 percent of the value of a respondent's U.S. sales constitute a pattern of prices that differ significantly, then we consider the extent of this pattern not to be significant in applying the A-A method, in part, but also find that segregating this pricing behavior from the pricing behavior which does not contribute to the pattern to be reasonable, and accordingly consider the application of the A-T method as an alternative comparison method to this limited portion of a respondent's U.S. sales.<sup>19</sup>

We also disagree with Hyundai Steel's assertion that we did not explain why the significant pattern of price differences cannot be accounted for when using the A-A method, pursuant to section 777A(d)(1)(B)(ii) of the Act. Section 777A(d)(1)(B)(i) of the Act, the "pattern" requirement, requires that the Department examine whether there exists a pattern of prices that differ significantly among purchasers, regions, or time periods. The Department considers whether the respondent's pricing behavior has created conditions in the U.S. market in which dumping may be "targeted" or masked. The difference in these two results is caused by higher U.S. prices offsetting lower U.S. prices where the dumping, which may be found on lower priced U.S. sales, is hidden or masked by higher U.S. prices,<sup>20</sup> such that the A-A method would be

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<sup>16</sup> 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) (*HR Steel Japan*), and accompanying Issues and Decision Memorandum at Comment 8; and *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 22971 (April 24, 2015) (*CTL Plate Korea 2013-2014*), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>17</sup> See *Apex Frozen Foods Private Limited v. United States*, 862 F.3d 1322, 1334 (Fed. Cir. 2017) (*Apex Frozen I*) ("The statute defines the preconditions for applying the A-T methodology, but it does not limit in any way the application of the A-T methodology, should the preconditions be met.") and *Apex Frozen Foods Private Limited v. United States*, 862 F.3d 1337 (Fed. Cir. 2017) (*Apex Frozen II*).

<sup>18</sup> See *Preliminary Results* and the accompanying Preliminary Decision Memorandum at 6.

<sup>19</sup> See *HR Steel Japan* and accompanying Issues and Decision Memorandum at Comment 8 and *CTL Plate Korea 2013-2014* and accompanying Issues and Decision Memorandum at Comment 1. See also *U.S. Steel Corp. v. United States*, 179 F.Supp.3d 1114, 1121-25 (CIT 2016), which affirmed our practice.

<sup>20</sup> See SAA.

unable to account for such differences.<sup>21</sup> Such masking or offsetting of lower prices with higher prices may occur implicitly within the averaging groups or explicitly when aggregating the A-A comparison results. Therefore, in order to understand the impact of the unmasked “dumping,” the Department finds that the comparison of each of the calculated weighted-average dumping margins using the standard and alternative comparison methodologies exactly quantifies the extent of the unmasked “targeted dumping.”

The simple comparison of the two calculated results belies the complexities in calculating and aggregating individual dumping margins (*i.e.*, individual results from comparing export prices, or constructed export prices, with normal values). It is the interaction of these many comparisons of export prices or constructed export prices with normal values, and the aggregation of these comparison results, which determine whether there is a meaningful difference in these two calculated weighted-average dumping margins. When using the A-A method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by higher-priced U.S. sales. Congress was concerned about offsetting and that concern is reflected in the SAA which states that “targeted dumping” is a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”<sup>22</sup> The comparison of a weighted-average dumping margin based on comparisons of weighted-average U.S. prices that also reflects offsets for non-dumped sales, with a weighted-average dumping margin based on comparisons of individual U.S. prices without such offsets (*i.e.*, with zeroing) precisely examines the impact on the amount of dumping which is hidden or masked by the A-A method. Both the weighted-average U.S. price and the individual U.S. prices are compared to a normal value that is independent from the type of U.S. price (*i.e.*, individual or weighted-average) used for comparison, and the basis for normal value will be constant because the characteristics of the individual U.S. sales<sup>23</sup> remain constant whether weighted-average U.S. prices or individual U.S. prices are used in the analysis.

Consider the simple situation where there is a single, weighted-average U.S. price, and this average is made up of a number of individual U.S. sales which exhibit different prices, and the two comparison methods under consideration are the A-A method with offsets (*i.e.*, without zeroing) and the A-T method with zeroing.<sup>24</sup> The normal value used to calculate a weighted-average dumping margin for these sales will fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

- 1) the normal value is less than all U.S. prices and there is no dumping;
- 2) the normal value is greater than all U.S. prices and all sales are dumped;

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<sup>21</sup> See *Union Steel*, 713 F.3d at 1108 (“{The A-A} comparison methodology masks individual transaction prices below normal value with other above normal value prices within the same averaging group.”).

<sup>22</sup> See SAA at 842.

<sup>23</sup> These characteristics may include such items as product, level-of-trade, time period, and whether the product is considered as prime- or second-quality merchandise.

<sup>24</sup> The calculated results using the A-A method with offsets (*i.e.*, no zeroing) and the calculated results using the A-T method with offsets (*i.e.*, no zeroing) will be identical. Accordingly, this discussion is effectively between the A-T method with offsets and the A-T method with zeroing.

- 3) the normal value is nominally greater than the lowest U.S. prices such that there is a minimal amount of dumping and a significant number of offsets from non-dumped sales;<sup>25</sup>
- 4) the normal value is nominally less than the highest U.S. prices such that there is a significant amount of dumping and a minimal number of offsets generated from non-dumped sales;
- 5) the normal value is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant number of offsets generated from non-dumped sales.

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

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

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<sup>25</sup> As discussed further below, note that scenarios 3, 4, and 5 imply that there is a wide enough spread between the lowest and highest U.S. prices so that the differences between the U.S. prices and NV can result in a significant amount of dumping and/or offsets, both of which are measured relative to the U.S. prices.



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

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

Therefore, the Department finds that the meaningful difference test reasonably fills the gap in the statute to consider why, or why not, the A-A method (or T-T method) cannot account for the significant price differences in Hyundai Steel’s pricing behavior in the U.S. market. Congress’s intent of addressing “targeted dumping,” when the requirements of section 777A(d)(1)(B) of the Act are satisfied,<sup>26</sup> would be thwarted if the A-T method without zeroing were applied since this will always produce the identical results when the standard A-A method without zeroing is applied. Under that scenario, both methods would inherently mask dumping. It is for this reason that the Department finds that the A-A method cannot take into account the significantly different U.S. prices for Hyundai Steel. The Department identified conditions where “targeted” or masked dumping “may be occurring” in its pattern analysis, and the Department concluded that the A-A method could not account for the significant price differences, which are exemplified by those differences found when satisfying the pattern requirement. Thus, the Department continues to find that application of the A-T method, with zeroing, is an appropriate tool to address masked or “targeted dumping,”<sup>27</sup> and has applied an alternative comparison method based on the A-T method to calculate the weighted-average dumping margin for Hyundai Steel in the final results of this review. The CAFC has recently upheld our rationale in support of the meaningful difference analysis to be reasonable.<sup>28</sup>

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<sup>26</sup> See SAA at 842-43.

<sup>27</sup> See *Apex Frozen Foods Private Ltd. v. United States*, 37 F. Supp. 3d 1286, 1296 (CIT 2014), *aff’d Apex Frozen Foods I*, 862 F.3d at 1331.

<sup>28</sup> See *Apex Frozen Foods II*, 862 F.3d at 1346.

Additionally, we find Hyundai Steel's reliance on *US-Washers (Korea)* and *US - Lumber (Canada)* is misplaced. The Court of Appeals for the Federal Circuit has held that WTO reports are without effect under U.S. law "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act (URAA).<sup>29</sup> In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of URAA reports.<sup>30</sup> As is clear from the discretionary nature of the scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute.<sup>31</sup>

With regards to the A-T method, specifically, and 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 sections 123 or 129 of the URAA. Based upon the foregoing, we have continued to apply the A-T method to Hyundai Steel's sales in this review.

## **Comment 2: Major Input Rule**

Nucor states that the Department correctly applied the major input rule to DSM's purchases of slab; however, Nucor argues that the Department improperly relied upon the cost of production (COP) information for DSM's affiliate provided by DSM to make this adjustment. According to Nucor, section 773(f)(3) of the Act requires the application of the major input rule to affiliated producers of the major input and the consideration of the affiliated producer's COP of such input when determining the value of that input. Specifically, Nucor explains, the Department determines the value of the major input based on the information available regarding such COP. Nucor states that, pursuant to this rule, the Department values the major input using the transfer price (which is the price paid to the affiliated party), the market price, or the affiliate's COP, whichever is the highest. Nucor states further that the Department's practice is to consider all three elements of the major input rule, *i.e.*, transfer price, COP, and market price, where available.

Nucor claims that the statute requires the analysis of the cost information on the record to conduct the major input rule analysis. Specifically, Nucor contends that *NTN Bearings Corp. of Am. v. United States*, 368 F.3d 1369, 1375-76 (Fed. Cir. 2004), explained that section 773(f)(3) of the Act mandates the use of COP for the valuation of major inputs if the COP is greater than the market price. Nucor argues that the Department will use all information on the record to obtain any of the three measures for its major input rule analysis, whether provided by a petitioner or a respondent. Nucor explains that the Department's policy is to examine the record to determine what information will replace the missing COP information and consider any information on the record indicating whether the affiliate's major input COP was higher than the market price or the transfer price. For example, Nucor states, the Department has considered and used information the petitioner provided as gap-filling facts available to apply the major input

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<sup>29</sup> See *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed.Cir. 2007).

<sup>30</sup> See, *e.g.*, 19 USC Section 3533, 3538 (sections 123 and 129 of the URAA).

<sup>31</sup> See, *e.g.*, 19 USC Section 3538(b)(4) (implementation of WTO reports is discretionary).

rule when the respondents' affiliated supplier refused to provide COP in certain steel cases.<sup>32</sup>

Nucor argues that the COP information provided by DSM is not supported by a single contemporaneous business document from the company and the financial statements used in the COP reconciliation are materially incomplete. Nucor claims that the Department has a longstanding practice of rejecting incomplete financial statements, especially those that do not contain a complete auditor's report in non-market economy cases.<sup>33</sup> Nucor contends that, because DSM submitted only a portion of the financial statements, although it had access to the full financial statements, the Department cannot properly determine the reliability or accuracy of the financial statements and it is unusable in this review. Nucor argues that DSM's COP reconciliation is not a true reconciliation.

Nucor argues that the COP reported by DSM is unsubstantiated. According to Nucor, DSM merely reported an unsubstantiated cost without proving any calculations that demonstrate how it arrived at the reported COP. Specifically, Nucor contends that DSM provided this COP without tying it to particular accounts reported by the affiliated slab producer, and it is not supported by contemporaneous business documents such as a trial balance. Nucor claims that DSM did not even provide affidavits or declarations from relevant personnel of the affiliated slab producer that could attest to the validity of the reported COP.

Nucor requests the use of the surrogate COP information that it submitted to the Department as neutral facts available. Nucor explains that, because the major input rule focuses on DSM's affiliated slab producer's COP, it calculated the affiliated slab producer's COP to reflect DSM's experience with purchasing slab from its Japanese affiliate. Nucor argues that this methodology produces even more accurate results than the methodology used in *CORE Korea*, because the cost build-up is specific to DSM's affiliated slab producer. Nucor explains that it calculated its surrogate COP based on the input factors of production from a surrogate U.S. producer of steel slab, adjusted for known differences between the Japanese and U.S. steel slab markets during the POR. According to Nucor, the Department has accepted similar COP information in recent petitions. Nucor explains further that, for slab purchased from intermediaries, such as Dongkuk Corporation, Nucor used the cost build-up for DSM's affiliated slab producer with additional items reported in DSM's section D response.

DSM argues that it provided the affiliated slab producer's COP as requested by the Department. Specifically, DSM explains that it provided the requested COP, calculations of the reported COP,

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<sup>32</sup> See Nucor's case brief at 7-8 citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 65 FR 5554 (February 4, 2000), *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Turkey*, 65 FR 15123 (March 21, 2000), and *Certain Corrosion-Resistant Steel Products from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 35303 (June 2, 2016) (*CORE Korea*).

<sup>33</sup> See Nucor's case brief at 9 citing *Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 81 FR 75032 (October 28, 2016), and accompanying Issues and Decision Memorandum at Comment 16 (*Iron Mechanical Transfer Drive Components China*), *Utility Scale Wind Towers from the Socialist Republic Vietnam: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 55333 (September 15, 2015), and *Wooden Bedroom Furniture from the People's Republic of China: Final Results of the 2004-2005 Semi-Annual New Shipper Reviews*, 71 FR 70739 (December 6, 2006).

and worksheets tying the calculations to the affiliate slab producer's financial statements. DSM states that the worksheet shows that DSM correctly included all components of the COP, *i.e.*, the cost of manufacture (COM), SG&A, and financial expenses. DSM states further that the worksheet also tied the calculations to the financial statements, showing the total costs for slab production and the total slab production quantity from which the per-ton COP can be calculated, and the COP of products other than slab, thus accounting for the affiliate's total cost in the financial statements. DSM argues that the Department used the reported COP in the preliminary major input test without any difficulty. DSM also argues that, in the four-month period between the submission of the COP on October 25, 2016, and the *Preliminary Results*, Nucor made no complaints regarding the COP calculation, the worksheet tying the COP calculation to the financial statements, or any alleged missing or incomplete documents. DSM contends that Nucor untimely seeks information beyond that requested by the Department, the absence of which cannot justify the rejection of the reported COP.

DSM contends that the Department does not need to fill the gap with the surrogate COP, because DSM provided the COP of its affiliated slab supplier. DSM explains that only the absence of the COP of the affiliated supplier justifies the use of a gap filler, and such is not the case in this review. According to DSM, in all cases cited in Nucor's argument, the respondent refused or otherwise was unable to provide the affiliate's COP for the major input and caused the Department to search the record for gap-filling facts available to replace the missing COP.

DSM claims that the rejection of the COP that it reported would be tantamount to the application of adverse facts available (AFA). DSM explains that section 782(e) of the Act does not allow the Department to "decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by" the Department. DSM argues that the COP that it submitted met the requirements established in the Department's supplemental questionnaire and, on this basis alone, Nucor's demand for the application of AFA is untenable. In addition, DSM contends that none of the prerequisites for the application of facts available are present because: (1) DSM timely submitted the requested COP information; (2) the information was available for verification; (3) the information was not so incomplete that it cannot serve as a reliable basis for the major input analysis; (4) DSM has acted to the best of its ability to provide the information, despite the fact that DSM has no means to compel the cooperation from its affiliated slab producer, which owned only a small percentage of DSM's shares; and (5) the submitted information was used without undue difficulties in the preliminary major input analysis. DSM states that it provided its affiliated slab producer's COP, including COM, SG&A, and financial expenses and the Department was able to use it in the *Preliminary Results*. DSM argues that, even if there was a defect in the COP that it reported, DSM was not accorded the required opportunity to correct, explain, or support with additional documents the purported deficiency under section 782(d) of the Act, which requires the Department to promptly inform the respondent of the nature of the deficiency and provide an opportunity to remedy or explain the deficiency.

DSM argues that, other than a worksheet, Nucor provided no documentation to substantiate its surrogate COP. Specifically, DSM contends that Nucor has not tied its worksheet to any financial statements or submitted any contemporaneous business documents to support its calculation of the surrogate COP. DSM contends further that Nucor has not provided any

reconciliation for its surrogate COP. Moreover, DSM claims, unlike the full information on the U.S. producer in the petition for *CORE Korea*, there is no information on the record of this review on the surrogate U.S. producer proposed by Nucor. DSM explains that, unlike in an antidumping petition that explains in detail the production capabilities of the U.S. producer, Nucor has provided no information on the company, not even the company's address, the type of products produced by this company, the company's production capacity, or the nature of the company's production. DSM states that, unlike the limited information on the surrogate COP Nucor submitted, the surrogate COP in the *CORE Korea* petition was analyzed at the initiation stage and found by the Department to be reasonable with no ground to question its reliability and relevance. DSM claims that the surrogate COP calculation worksheet Nucor submitted in this review is not comparable to the detailed COP information that the Department relied on in *CORE Korea*.

On June 30, 2017, the Department fully extended the final results of this review to August 30, 2017. On July 10, 2017, the Department issued a supplemental questionnaire to DSM for complete copies of the financial statements at issue. On July 17, 2017, DSM responded to the Department's supplemental questionnaire. On July 25, 2017, Nucor filed comments in response to DSM's July 17, 2017, supplemental response. On August 1, 2017, Nucor and DSM filed case briefs limited to DSM's July 17, 2017, supplemental response.

DSM argues that it submitted the complete, full financial statements of the affiliated slab producer and affiliated slab producer's owner company for fiscal year 2015. DSM explains that it previously submitted the balance sheet, income statements, statements of changes in net assets, and notes of the financial statements of both companies. DSM claims that, with the addition of the auditor's report to the previously submitted financial statements of its affiliated slab producer for fiscal year 2015, DSM has submitted the complete, full financial statements of these two companies. DSM contends that there is no factual information on the record to rebut this fact.

DSM states that its affiliated slab producer had submitted the prior year's version of these financial statements in another investigation and Nucor submitted the cost verification report in that investigation, which noted that these financial statements are "attachments" to the affiliated slab producer's securities report made public on an electronic disclosure system. According to DSM, the Department verified the prior year's version of these financial statements during that investigation and no interested parties in that investigation objected to the financial statements submitted by this affiliated slab producer.

Nucor requests that the Department apply total AFA to DSM for the final results of this review. Nucor explains that the Department applies facts otherwise available when, *inter alia*, a respondent (1) withholds information that the Department requested, (2) fails to provide information in a timely manner or in the form requested, (3) significantly impedes a proceeding, or (4) provides unverifiable information. Nucor states that, in relying on the facts otherwise available, the Department may use an inference that is adverse to the interests of the party providing deficient information if the party has failed to cooperate to the best of its ability to comply with a request for information. Nucor argues that the Department's ability to resort to AFA is critical in the administration of the antidumping and countervailing duty laws. Nucor

contends that the “best of its ability” standard assumes the respondent’s familiarity with the rules and regulations and requires no finding of motivation or intent. Nucor claims that the Department must only find that, although a reasonable and responsible respondent would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations, the respondent failed to keep or maintain all required records, and did not put forth its maximum efforts to investigate and obtain the information from its records that refer or relate to the imports in question to the full extent of the respondent’s ability to do so.

Nucor states that the Department has discretion to apply AFA to ensure that the respondent does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. Nucor argues that the Department should consider the extent to which a respondent may benefit from its own lack of cooperation. Nucor asserts that the Department, not the respondent, determines what information is necessary and relevant and must be provided. Nucor contends that AFA is appropriate if information is missing from the record because of the respondent’s failure to act to the best of its ability, for example, by failing to maintain adequate records of information that it should reasonably know may be requested by the Department or by providing unverifiable information.

Nucor states that, in the July 10, 2017, supplemental questionnaire, the Department specifically instructed DSM to “provide the complete, full financial statements of the affiliated supplier for the fiscal year 2015” and identified certain components that must be included in the financial statements, such as “an auditor’s report and accompanying footnotes,” “balance sheet, income statement, statement of cash flows, statement of changes in equity, *etc.*” Nucor argues that, although the Department carefully analyzed the financial statements that DSM provided in its first supplemental response, the Department found that they were incomplete, and requested that DSM provide additional documents to supplement the record to remedy those deficiencies, DSM did not do so.

Nucor disagrees with DSM’s statement on page 1 of the supplemental response dated July 17, 2017, that DSM submitted the complete, full financial statements of the affiliated slab supplier and the affiliated slab supplier’s owner company for fiscal year 2015 in the supplemental response dated October 25, 2016. Nucor claims that this statement appears to be false because DSM admitted in the same supplemental response that it did not include certain documents in the supplemental response dated October 25, 2016. Nucor contends that DSM’s claim with regards to these missing documents is not substantiated by any laws. Given certain aspects of this affiliated slab producer, according to Nucor, DSM failed to explain certain deficiencies with regards to this affiliated slab producer’s financial statements.

Nucor contends that, notwithstanding DSM’s failure to follow the Department’s instructions to provide this affiliated slab producer’s full financial statements, DSM failed to provide the English translation of the complete, full financial statements of the affiliated supplier and the affiliated supplier’s owner company. Nucor claims that the English translation does not have many pages of the financial statements in the original language. In addition, Nucor argues that DSM did not provide the English translation of the original version of a document in Exhibit 3S-4 of the supplemental response dated July 17, 2017. Nucor alleges pagination and page count

discrepancies between the affiliated slab producer's financial statements DSM submitted in its supplemental response dated October 25, 2016, and the affiliated slab producer's financial statements DSM submitted in its supplemental response dated July 17, 2017.

Nucor states that DSM failed to explain why it could not obtain the full financial statements of the affiliated slab producer and the affiliated slab producer's owner company. Nucor explains that, in addition to requesting that DSM provide their full and complete financial statements, the Department also provided DSM with an opportunity to explain why it could not obtain their full financial statements. Specifically, according to Nucor, the Department asked DSM that, if DSM did not submit their complete financial statements, it should explain why it was unable to provide the full financial statements, provide documentation demonstrating DSM's efforts to obtain them, and source documentation demonstrating certain corporate ownership. Nucor argues that DSM ignored these questions and simply responded that these questions are not applicable. Nucor claims that the affiliated slab producer's financial statements that DSM claims to be complete and full are missing substantial portions and, even if the document that DSM supposedly downloaded from a certain website contained a portion of the affiliated slab producer's financial statements as an attachment, DSM was required to obtain the missing information from the affiliated slab producer and provide such information in its supplemental response dated July 17, 2017. Nucor argues that DSM appears to have made no efforts at all to obtain complete and full financial statements from the two companies. Nucor states that there is no information on the record demonstrating that DSM requested the complete and full financial statements from its affiliated slab producer but the affiliated slab producer declined to provide the complete and full financial statements to DSM. According to Nucor, there is also no information on the record regarding certain corporate ownership that the Department requested and DSM has failed to justify its inability to provide the affiliated slab producer's full financial statements.

Nucor requests that, if the Department does not apply AFA to DSM, then the Department should rely on facts available and use the cost build up that Nucor provided to recalculate DSM's major input rule adjustment.

DSM contends that it submitted the financial statements and English translation thereof for its affiliated slab supplier and affiliated slab supplier's owner company in response to the Department's request. DSM also contends that it provided the auditor's report that covers both its affiliated slab supplier and its affiliated slab supplier's owner company. DSM argues that Nucor misrepresents a certain document that includes documents including, but not limited to, the financial statements of these two companies that the Department requested. DSM explains that, because it provided complete, full English translations of the financial statements and notes that are in this document, it was not necessary, and the Department did not request DSM, to translate this document in its entirety. DSM claims that it has no obligation to provide any foreign laws or legal advice that demonstrate the requirements for the issuance of financial statements of public companies.

DSM argues that, because it provided complete, full financial statements for its affiliated slab supplier and its affiliated slab supplier's parent company, the Department's request for explanation of why DSM was unable to provide the full financial statements, documentation

demonstrating DSM's efforts to obtain them, and source documentation demonstrating certain corporate ownership were inapplicable.

DSM argues that, even assuming *arguendo* that Nucor's arguments against DSM with respect to financial statements are correct, the application of total AFA is unwarranted because the financial statements were required for the major input analysis to tie the slab COP calculations to those financial statements and no basis exists for a total rejection of DSM's sales and cost databases.

**Department's Position:** For the final results, we have continued to use the information submitted by DSM pertaining to its affiliated supplier's COP to calculate the major input adjustment in accordance with sections 773(f)(2) and (3) of the Act. In the *Preliminary Results*, we compared the reported transfer price to the market price and the affiliated supplier's COP and then adjusted to the higher of the three, which is the market price. We continue to do so for the final results of this review.

After the *Preliminary Results*, Nucor submitted its first case brief on April 3, 2017, in which Nucor alleged certain deficiencies in the financial statements DSM used in the COP reconciliation.<sup>34</sup> Thereafter, in order to rectify these deficiencies, we fully extended the deadline for the final results of this review. In response to our subsequent supplemental questionnaire,<sup>35</sup> DSM provided additional information regarding the financial statements in question.<sup>36</sup> With the additional financial statements information DSM provided, we now have financial statements for the affiliated slab producer and the affiliated slab producer's parent company for fiscal year 2015 along with the auditor's report that covers both companies.<sup>37</sup> Therefore, we no longer have any deficiencies alleged in Nucor's first case brief with respect to the financial statements used in the COP reconciliation.<sup>38</sup>

Sections 776(a)(1) and (2) of the Act provide that, if necessary information is not available on the record or if an interested party or any other person (A) withholds information that has been requested by the administering authority, (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to sections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under this subtitle, or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, the administering authority shall use, subject to section 782(d) of the Act, the facts otherwise available in reaching the applicable determination.<sup>39</sup>

Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) of the Act if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified;

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<sup>34</sup> See Nucor's first case brief dated April 3, 2017.

<sup>35</sup> See the Department's supplemental questionnaire dated July 10, 2017.

<sup>36</sup> See DSM's supplemental response dated July 17, 2017.

<sup>37</sup> See DSM's supplemental responses dated October 25, 2016, and July 17, 2017.

<sup>38</sup> For more details that contain DSM's business proprietary information, see the Memorandum, "Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Analysis Memorandum for Dongkuk Steel Mill Co., Ltd." (DSM Final Analysis Memo) dated concurrently with this Issues and Decision Memorandum.

<sup>39</sup> See sections 776(a)(1) and (2) of the Act.



(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; (5) the information can be used without undue difficulties.

In this case, DSM submitted its affiliated slab producer's COP in a timely manner to the best of its ability. The COP information was subject to verification and used for the preliminary and now final results without undue difficulties. The COP information is not so incomplete to the extent that it cannot serve as a reliable basis for the major input adjustment because DSM demonstrated how it reconciled with the financial statements.<sup>40</sup> We therefore determine that DSM's collective responses satisfy the requirements of section 782(e) of the Act, and that accordingly, the Department shall not decline to consider such information.

The cost of goods sold used in the reconciliation of the COP to the financial statements of the affiliated slab producer ties to the financial statements of the affiliated slab producer.<sup>41</sup> In response to our requests for audited financial statements, DSM provided the financial statements of the affiliated slab producer and the affiliated slab producer's owner company for fiscal year 2015 along with the auditor's report that covers both companies.<sup>42</sup> DSM did not need to provide the complete and full English translation of the document that contained the auditor's report, financial statements, and notes of these two companies because we did not request the submission of that particular comprehensive document that contained more information than the auditor's report, financial statements, and notes.<sup>43</sup>

Nucor's request for an application of total AFA with respect to DSM is based on Nucor's position that DSM's responses did not provide the Department with the information it requested. As explained above, because DSM cooperated to the best of its ability with our requests for information, we have no basis to apply AFA to DSM.

Because DSM provided the information that we requested, DSM did not need to respond to our questions regarding why DSM was unable to provide the full financial statements, documentation demonstrating DSM's efforts to obtain them, and source documentation demonstrating certain corporate ownership were inapplicable.<sup>44</sup> In fact, we asked DSM to respond to these questions only if DSM was not able to obtain the information we requested.<sup>45</sup> We conclude that the COP information reported by DSM fulfills the requirements of section 782(e) of the Act and we are, therefore, continuing to use the information submitted by DSM pertaining to its affiliated supplier's COP to calculate the major input adjustment in accordance with section 773(f)(2) and (3) of the Act. We, therefore, compared the reported transfer price to the market price and to the COP and then adjusted to the higher of the three, which in this case is the market price.

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<sup>40</sup> See DSM's supplemental response dated October 25, 2016, at 1-2 and Exhibit SD-12.

<sup>41</sup> *Id.* at 1-2 and Exhibits SD-13 and SD-14.

<sup>42</sup> See DSM's supplemental response dated October 25, 2016, at 2 and Exhibit SD-13, and DSM's supplemental response dated July 17, 2017. For more details that contain DSM's business proprietary information, see DSM Final Analysis Memo.

<sup>43</sup> See the Department's supplemental questionnaire dated July 10, 2017, at 3.

<sup>44</sup> See DSM's supplemental response dated July 17, 2017.

<sup>45</sup> See the Department's supplemental questionnaire dated July 10, 2017, at 3.

We did not use the cost build up that Nucor provided in its request for the recalculation of DSM's major input rule adjustment. We reviewed Nucor's proposed methodology and note that it is based on input quantities that cannot be tied to the U.S. manufacturer's financial statements.<sup>46</sup> Given this, we find that it is appropriate to use the affiliated supplier's COP provided by DSM for the major input adjustment.

### **Comment 3: Cost Differences Not Associated With Physical Characteristics**

Nucor requests that the Department recalculate DSM's costs to eliminate cost differences unrelated to physical characteristics. Nucor argues that DSM's costs are, to a certain extent, different between control numbers within the same quality specifications and heat treatments for several products. Nucor explains that, in response to the Department's question to DSM concerning these cost differences, DSM attributed these differences to the differences in thickness or production yield. Nucor contends that the magnitude of the cost differences could not possibly be explained solely by differences in thickness or production yield because: (1) the differences in thickness can affect only conversion costs, *i.e.*, direct labor, variable overhead, and fixed overhead; and (2) the differences in production yield could not possibly cause such a big difference in total cost of manufacture without a very low COP as in the case of producing scrap.

Nucor explains that, in *CTL Plate Korea 2014-15*, the Department found that Hyundai Steel's cost database showed the same cost discrepancies as in DSM's cost database in this review and adjusted Hyundai Steel's costs for the final results of that review. Specifically, according to Nucor, Hyundai Steel's costs considerably varied although the sole difference in physical characteristics was the product thickness and, as a result, the Department determined that the reported costs did not reasonably reflect the costs associated with the production and sales of subject merchandise and reallocated Hyundai Steel's costs among products to eliminate as much of the difference as possible. Nucor states that the Department has an established practice of adjusting reported costs to eliminate significant cost differences between similar and identical control numbers, as the Department did in, *e.g.*, *Pipes and Tubes Korea* and *CWP Korea*.<sup>47</sup> Nucor argues that the Department should recalculate DSM's costs to eliminate or, at least, mitigate to the degree possible, the difference in costs that are not driven by the differences in physical characteristics.

DSM argues that Nucor's request is not based on factual support or analysis demonstrating that the differences in costs are not driven by physical characteristics. DSM claims that it demonstrated that the differences in costs are attributable to the differences in physical characteristics, *e.g.*, standard thickness. Specifically, DSM contends that Nucor has not challenged the evidence of DSM's comparisons of COM trend by thickness or yield ratio, which

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<sup>46</sup> See Nucor's Major Input Rule Allegation dated July 27, 2016, at 5 and Exhibits 3 and 14. Most of the exhibits in Nucor's Major Input Rule Allegation dated July 27, 2016 are documents supporting its calculation of various costs. None of these exhibits contains any source data or source documentation substantiating the input quantities reported in Exhibits 3 and 14, which provide the input quantities used in Nucor's surrogate COP.

<sup>47</sup> See *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 81 FR 47347 (July 21, 2016) (*Pipes and Tubes Korea*), and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 39908 (June 20, 2016) (*CWP Korea*).

DSM submitted in response to the Department's request for an explanation of the cost differences between five pairs of control numbers. DSM also contends that Nucor ignores DSM's explanation that "products with extraordinary thickness cost more to produce than products with standard thickness...."

DSM argues that the three cases Nucor cites in its request for the recalculation of DSM's costs are inapposite. First, DSM argues that *CWP Korea* found that no adjustment was warranted, because the differences were normal, considering the respondent's actual production nor were they otherwise "insignificant in relation to the totality of reported production information." DSM explains that, as was the case with the respondent in *CWP Korea*, DSM has demonstrated that differences in reported costs mostly were attributable to the differences in thickness, *e.g.*, plates with extra ordinary thickness have higher costs than plates with normal thickness. DSM claims that its control numbers served their function because differences in thickness, which is a characteristic in the control number, explained the differences in costs for three of the five control number pairs selected by the Department. DSM states that it demonstrated that the cost differences for the remaining two control number pairs were attributable to differences in yield loss. According to DSM, even if the Department finds these two pairs to be outliers, they are insignificant in relation to the totality of the reported production information as their total quantity is 0.001 percent of the total reported production quantity.

DSM distinguishes itself from *Pipes and Tubes Korea*, in which the Department adjusted the respondent's costs after finding that the differences in costs were due to the "timing of the coil purchases and the timing of the pipe production ... rather than the ... physical characteristics." DSM claims that it has demonstrated that the differences in cost are due to a physical characteristic in the control number, *i.e.*, thickness, and differences in yield loss.

DSM explains that, in *CTL Plate Korea 2014-15*, the Department found that the differences in costs were not related to characteristics in the control number but "the result of differences in product-specific production volumes and differences in processing at the pre-rolling production stage." DSM contends that there is no justification for the same finding in this review.

**Department's Position:** For the final results, we recalculated DSM's reported costs. Pursuant to section 773(f)(1)(A) of the Act, "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles (GAAP) of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise."

Accordingly, we are instructed to rely on a company's normal books and records if two conditions are met: 1) the books are kept in accordance with the home country's GAAP; and 2) the books reasonably reflect the cost to produce and sell the merchandise. In the instant case, the unadjusted per-unit costs are derived from DSM's normal books and records, which are kept in accordance with Korean GAAP.<sup>48</sup> Therefore, the question we are facing is whether the per-unit costs from DSM's normal books reasonably reflect the cost to produce and sell the subject merchandise.

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<sup>48</sup> See DSM's section A response dated June 13, 2016, at Exhibit A-21.

At the outset of a case, we identify the physical characteristics that are the most significant in differentiating products. These are the physical characteristics that define unique products, *i.e.*, the control numbers, for sales comparison purposes. The level of detail within each physical characteristic (*e.g.*, the multiple different grades or sizes of a product) reflects the importance, with price-to-price comparisons, that we place on establishing normal values based on comparison market sales of the identical, or the most similar, foreign like product. Thus, under sections 773(f)(1)(A) and 773(a)(6)(C)(ii) and (iii) of the Act, a respondent's reported product costs should reflect meaningful cost differences attributable to these different physical characteristics. This ensures that the product-specific costs we use for the sales-below-cost test, constructed export price profit, constructed value, and the difference-in-merchandise adjustment, accurately reflect the distinct physical characteristics of the products whose sales prices are used in our dumping calculations.

The physical characteristics identified in this case are whether or not the plate is painted, quality, specification and grade, heat treatments, standard thickness, and standard width.<sup>49</sup> Our review of the costs specific to control numbers indicates that, when the first four physical characteristics are held constant, there is considerable variation in costs that do not appear to be attributable to physical differences. Consistent with our adjustment to smooth the costs reported by Hyundai Steel in the last completed new shipper review, we adjusted DSM's submitted costs to smooth the cost difference unrelated to physical characteristics.<sup>50</sup>

#### **Comment 4: Cost of Prime Products**

Nucor argues that the Department should modify Hyundai Steel's reported costs to more accurately reflect the cost of prime products. Nucor asserts that Hyundai Steel inappropriately allocated full costs to non-prime products, which results in the cost of its prime products being grossly understated. Nucor contends that this is because Hyundai Steel's methodology allocates costs away from the products that matter for the purposes of antidumping calculations to those that do not.

Citing *Welded Line Pipe from Turkey* and *Heavy-Walled Pipe from Turkey*, Nucor claims that the Department has consistently found in prior cases that non-prime products should not be valued at the same manufacturing cost as prime products.<sup>51</sup> Nucor argues that the Department should cap the cost of non-prime products at their net realizable values following the approach in *Welded Line Pipe from Turkey*. In the alternative, Nucor suggests that the Department make an overall adjustment to the price of non-prime products based on their deviation from the overall weighted-average price.

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<sup>49</sup> See, *e.g.*, the original questionnaire dated April 29, 2016, at B-8 through B-13.

<sup>50</sup> See *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2014-2015*, 81 FR 62712 (September 12, 2016), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>51</sup> See *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 18, and *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 81 FR 47355 (July 21, 2016) (*Heavy-Walled Pipe from Turkey*), and accompanying Issues and Decision Memorandum at Comment 11.

Hyundai Steel argues that no adjustment to Hyundai Steel's cost calculations is warranted or necessary. Hyundai Steel contends that the reason it calculated the costs of non-prime products in the same manner as for prime products is that it incurs the same costs for prime and non-prime subject merchandise, and it has no idea at the time that it incurs costs for non-prime products whether the finished good ultimately will be prime or non-prime merchandise.

Hyundai Steel claims that, in *Welded Line Pipe from Turkey*, both the petitioners and the relevant respondent concurred that an adjustment with respect to the respondent's second-quality pipe costs was necessary given the specific facts of that case, although the Department's rationale for adjusting the respondent's costs is not articulated. Hyundai Steel alleges that Nucor made no attempt whatsoever to show that the facts of that case apply here. Moreover, Hyundai Steel asserts that *Heavy-Walled Pipe from Turkey* contradicts Nucor's argument.

**Department's Position:** We agree with Nucor that an adjustment should be made. We do not have a practice of automatically limiting the COM to the sales value/net realizable value; rather, we analyze the products sold as non-prime on a case-by-case basis to determine whether the non-prime products can still be used in the same applications as prime products.<sup>52</sup> If the non-prime products can be used in the same applications, and the company assigns full costs to those products in its normal books and records, then we value them using the method the company uses to value them in its normal books and records.<sup>53</sup> Conversely, if the non-prime products cannot be used in the same application, then the net total costs incurred (*i.e.*, total production costs of prime merchandise less the market value of downgraded non-prime production) should be allocated to prime-quality production costs.<sup>54</sup>

In this case, Hyundai Steel reported that some of its non-prime sales may be used for the same purpose as prime products while other non-prime sales cannot.<sup>55</sup> Thus, the record shows that Hyundai Steel's non-prime sales include products which cannot be used in the same applications as prime products. For this reason, we have adjusted Hyundai Steel's reported costs in order to allocate the net total costs incurred to prime-quality merchandise.<sup>56</sup>

## **Comment 5: Affiliated-Party Inputs**

Nucor argues that the Department should apply AFA to the cost of a certain input which Hyundai Steel obtained from affiliated suppliers. Nucor asserts that Hyundai Steel has refused to provide conversion information for its purchases of these inputs, as requested by the Department. According to Nucor, Hyundai initially refused to provide market prices for the input in question

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<sup>52</sup> See, e.g., *Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014), and accompanying Issues and Decision Memorandum at Comment 18.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See Letter from Hyundai Steel, "Certain Cut-To-Length Carbon-Quality Steel Plate from Korea: Hyundai Steel Supplemental Sections A-D Questionnaire Response," dated September 13, 2016 at 21-22.

<sup>56</sup> See memorandum to file, "Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results Analysis Memorandum for Hyundai Steel Company," dated concurrently with this memorandum (Hyundai Steel Final Analysis Memo).

when the Department requested them, arguing that they do not reflect market value. Nucor claims that Hyundai Steel failed to explain why these transactions do not reflect market value and that these purchases were open-market, arm's-length transactions with unaffiliated suppliers, and there is no evidence on the record that suggests that the prices charged by these suppliers do not reflect market prices.

Nucor contends that, when the Department reiterated its request, Hyundai Steel submitted purchases from unaffiliated suppliers in units of measurements that were different from the units of measurement used for affiliated supplier purchases, without providing conversion factors, which renders the submitted information unusable. According to Nucor, when the Department asked Hyundai Steel to provide a conversion factor, Hyundai Steel simply refused to provide the requested information, claiming that it has not found a means to convert the purchases to such a common unit of measure for the simple reason that Hyundai Steel purchases these inputs in different forms for a wide variety of purposes other than the production of subject merchandise. As a result, Nucor concludes, the unaffiliated supplier purchase information Hyundai Steel supplied remains unusable.

Nucor argues that, given Hyundai Steel's failure to act to the best of its ability when providing responses to the Department's requests for information, the Department should apply AFA for its final results. As AFA, Nucor suggests that the Department should double the prices that Hyundai Steel paid to its affiliates for the input in question.

Hyundai Steel argues that the Department should not apply AFA because Hyundai Steel has fully cooperated with the Department and made every effort to respond to the Department's questions throughout this proceeding. Hyundai Steel contends that, even though the input in question is not a major input, Hyundai Steel, nonetheless, provided the Department with the input purchase data. Hyundai Steel asserts that Nucor has not pointed to any reason for the Department to conclude that Hyundai Steel has failed to act to the best of its ability.

Hyundai Steel claims that there are no means to convert the unit of measure for the inputs purchased in different forms and delivered by different means and that it cannot convert the purchases to a common unit of measure for the simple reason that Hyundai Steel purchases these inputs in different forms for a wide variety of purposes other than the production of subject merchandise. Hyundai Steel asserts that those forms reflect the way in which the inputs will be consumed, such as technical support or research and development activities, and that conversion of these inputs would require additional technical data that are simply not provided in the normal course of business, because such conversion factors are unnecessary for these commercial transactions. Moreover, Hyundai Steel contends that the unit price of the inputs purchased from unaffiliated suppliers includes additional costs not included in the price of the inputs purchased from the affiliated supplier. For these reasons, Hyundai Steel concludes, its purchases of the inputs from unaffiliated suppliers did not represent an appropriate benchmark for its purchases of the inputs from the affiliated supplier.

**Department's Position:** We disagree with Nucor. The record contains evidence demonstrating that there are significant differences in physical forms, units of measurements, and delivery methods between the inputs Hyundai Steel purchased from the affiliated supplier and the inputs

Hyundai Steel purchased from unaffiliated suppliers.<sup>57</sup> As a result, such differences do not allow us to make an apples-to-apples comparison of the two prices. Therefore, consistent with our practice, we compared the prices of the inputs obtained from the affiliated supplier to the affiliated supplier's cost of producing the inputs and found that the prices of the inputs obtained from the affiliated supplier exceed the affiliated supplier's cost of producing the inputs.<sup>58</sup> Accordingly, we determine that the prices of the inputs obtained from the affiliated supplier were at arm's length and, therefore, no adjustment is necessary.

## **Comment 6: Overrun Sales**

Hyundai Steel argues that the Department should find that Hyundai Steel's home-market sales of overrun CTL plate are within the ordinary course of trade. Hyundai Steel contends that the Department's assertion that it has unfettered discretion to pick and choose from a broad range of open-ended factors misstates the statute, court precedent and the Department's prior practice as it relates to overruns.

Hyundai Steel claims that the Department employs an established methodology to determine whether overrun sales are in the ordinary course of trade pursuant to sections 771(15) and 773(a)(1)(B) of the Act. Citing *NOES from Korea*, Hyundai Steel asserts that the Department examines multiple factors, including (but not limited to): (1) whether the merchandise is "off-quality" or produced according to unusual specifications; (2) the comparative volume of sales and the number of buyers in the home market; (3) the average quantity of an overrun sale compared to the average quantity of a commercial sale; and (4) the price and profit differentials in the home market.<sup>59</sup> Citing *NOES from Korea*, Hyundai Steel avers that the Department examines the totality of factors based on record evidence.<sup>60</sup>

Citing a number of cases, Hyundai Steel argues that the Department's analysis of the totality of these factors in prior cases historically has set a high bar to find that overrun sales are not made in the ordinary course of trade.<sup>61</sup> According to Hyundai Steel, the Department's *Preliminary Results* indicate that the agency only conducted a results-oriented, partial assessment of the data, and therefore did not fulfil its statutory obligation to consider the totality of the circumstances with respect to Hyundai Steel's overrun sales.

Hyundai Steel contends that the Department's conclusion to reject all overruns on the basis that a subset is designated as overruns for quality reasons is illogical. Indeed, the record directly

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<sup>57</sup> See Letter from Hyundai Steel, "Certain Cut-To-Length Carbon-Quality Steel Plate from Korea: Hyundai Steel Third Supplemental Questionnaire Response," dated December 6, 2016 at 9 and Exhibit S3-6.

<sup>58</sup> See Letter from Hyundai Steel, "Certain Cut-To-Length Carbon-Quality Steel Plate from Korea: Hyundai Steel Supplemental Sections A-D Questionnaire Response," dated September 13, 2016 at Exhibit S-32-B.

<sup>59</sup> See *Non-Oriented Electrical Steel from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 61612 (October 14, 2014) (*NOES from Korea*), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., *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 15.

contradicts the Department's assertion because a significant proportion of Hyundai Steel's overrun sales are designated as prime merchandise. Hyundai Steel claims that the Court of International Trade (CIT) has held that the Department is "unable to determine whether a producer's overrun sales were sold outside the ordinary course of trade until the agency has actually evaluated the producer's complete overrun sales data."<sup>62</sup> Citing *Hot-Rolled from India*, Hyundai Steel asserts that the Department examines individual sales vis-à-vis prime vs. non-prime overruns to determine whether those sales are made outside the ordinary course of trade.<sup>63</sup> Thus, Hyundai Steel avers, the Department's conclusion that the fact that a certain portion of Hyundai Steel's sales of overrun merchandise somehow provides a basis for determining that all of its overrun sales are made outside of the ordinary course of trade is contrary to the record and the law. Furthermore, with respect to the portion of overrun sales that were designated as non-prime, Hyundai Steel does not concede that it would be necessary to reject sales designated as overruns for quality reasons because such a factor is not dispositive.

Hyundai Steel argues that its sales of overrun merchandise were not of aberrationally low volume or to an aberrationally small number of customers. Hyundai Steel asserts that the Department's analysis fails to recognize that overruns, by their nature, should be a relatively small subset of sales as compared to non-overrun sales. Hyundai Steel claims that this factor in the Department's analysis is properly understood to mean that sales should be disregarded where the ratio is aberrationally so small as to signify that overrun sales are uncommon, but such is not the case here. Citing section 771(15) of the Act, Hyundai Steel contends that the Department's rigid analysis ignores the plain text of the statute, which defines "ordinary course of trade" to mean "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." According to Hyundai Steel, the plain text of the statute dictates that the Department's examination of the ratio of overruns to non-overruns should be used to determine whether overrun sales have been normal in the trade under consideration for a foreseeable time prior to the exportation of the subject merchandise. Hyundai Steel alleges that an examination of the ratio in these circumstances should be limited to see whether a given ratio is historically aberrational vis-à-vis other time periods, not based on a determination of whether a given quantity of overrun sales or customers approaches a one-to-one ratio with respect to non-overrun sales. Hyundai Steel avers that the Department's use of the test here thus ignores the plain text of the statute by imposing a requirement that essentially presumes, contrary to the Department's established practice, that overruns cannot be found to be inside the ordinary course of trade unless they approach a one-to-one ratio to non-overrun sales.

Hyundai Steel argues that the Department's analysis of the average quantity of Hyundai Steel's overrun sales does not support finding that Hyundai Steel's overrun sales were outside the ordinary course of trade. Hyundai Steel alleges that the Department's expression of the quantity difference is misleading. According to Hyundai Steel, it is not meaningful to compare the average of the quantities of all non-overrun sales to the average of a subset and expect a one-to-

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<sup>62</sup> See *China Steel Corp. v. United States*, 264 F. Supp. 2d 1339 (CIT 2003).

<sup>63</sup> See *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Final Results of Antidumping Duty Administrative Review*, 73 FR 31961 (June 5, 2008) (*Hot-Rolled from India*), and accompanying Issues and Decision Memorandum at Comment 2 (disregarding only those overruns designated by respondent Tata as "off-quality").



one result. Hyundai Steel contends that, by the Department's logic, any discrepancy between non-overrun and overrun sales would lead to a finding that overrun sales are not made in the ordinary course of trade.

Hyundai Steel argues that the fact that it sold overrun merchandise at a much lower price than the price at which it sold non-overrun merchandise does not mean, however, that overrun sales are not normal in the trade with respect to sales of CTL plate in the Korean home market. Hyundai Steel asserts that the relevant inquiry is whether the sales were made in the ordinary course of trade, *i.e.*, whether the sales were "normal in the trade."

Nucor argues that the Department properly disregarded Hyundai Steel's overrun sales in the home market. According to Nucor, the Department's application of its overrun methodology is consistent with the statute and longstanding agency practice, which has been affirmed by the CIT. Nucor asserts that the Department's analysis of the totality of circumstances surrounding Hyundai Steel's sales of overrun merchandise demonstrates that these sales were outside the ordinary course of trade.

Citing the SAA, Nucor argues that the Department has broad authority to "consider other types of sales and transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market."<sup>64</sup> Accordingly, Nucor avers, the Department has discretion to choose how best to analyze the many factors involved in a determination of whether sales are made within the ordinary course of trade and the Department's ordinary course of trade inquiry is far-reaching in nature.

According to Nucor, while Hyundai Steel claims that the Department's overrun analysis was results-oriented, Hyundai Steel apparently reached this conclusion by inappropriately assessing its overrun sales in isolation. Nucor contends that, contrary to Hyundai Steel's claims, the Department does not consider each of its overrun factors in a vacuum; instead, the agency examines the totality of the factors based on the record evidence. Nucor asserts that the Department does not analyze individual overrun transactions; rather, the agency compares one subset of data to another in its overrun analysis to identify trends, conditions, and practices in accordance with section 771(15) of the Act. Accordingly, Nucor contends, the Department's assessment appropriately focuses on comparative analyses whereby it evaluates how each factor applies to overrun sales as a whole, compared to non-overrun sales.

Nucor further argues that, while Hyundai Steel takes issue with the Department's analysis under each of the four factors identified by the Department, the respondent failed to provide any legal support for the vast majority of its arguments. Specifically, Nucor asserts, in its discussions of three of the factors, Hyundai Steel failed to cite a single case supporting its arguments. According to Nucor, in the only section in which Hyundai Steel references legal support (*i.e.*, whether the merchandise is "off-quality"), the facts of the cases cited by Hyundai Steel are distinguishable and actually support the Department's application of its longstanding overruns methodology.

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<sup>64</sup> See SAA at 834.

Nucor argues that the Department correctly found that Hyundai Steel's overrun sales were of a lower quality than its non-overrun sales. Nucor claims that Hyundai Steel substantially mischaracterizes the Department's analysis. According to Nucor, the Department appropriately found that overrun sales are far more likely than non-overrun sales to consist of non-prime CTL plate. Nucor asserts that overruns are those products that were rejected by one customer and sold to another customer and that Hyundai Steel admitted that a substantial portion of these sales were rejected because of quality issues. Nucor alleges that, while Hyundai Steel may have eventually sold the product to another customer and classified it as prime product for the Department's questionnaire, the fact remains that the original customer likely rejected the plate because it failed to meet the quality standards of the original order. Nucor asserts that the fact that a respondent classifies certain overrun material as prime for the Department's questionnaire does not, by itself, indicate that these sales should be considered as made within the ordinary course of trade. To support its argument, Nucor cites *Welded Carbon Steel Pipe from Turkey* where, even though all of the respondent's home market sales of overruns were reported as prime grade products, the Department concluded that considering the factors "*in toto*," the overrun merchandise was outside the ordinary course of trade.<sup>65</sup> Nucor also cites *NOES from Korea*, where the fact that the respondent "does not classify overrun products as nonprime merchandise does not, by itself, indicate that these sales should be considered in the ordinary course of trade."<sup>66</sup>

Nucor further contends that Hyundai Steel's reliance on *Hot-Rolled from India* is misplaced because, contrary to Hyundai Steel's claim, the Department did not find that only the non-prime overruns sold by the respondent, as opposed to its sales of prime overruns, were outside the ordinary course of trade simply because Tata designated the non-prime overruns as off-quality. Rather, Nucor asserts, the Department considered the totality of circumstances, which included the quantity of individual sales, the profit and new unit sales price, and the lack of concentrated customer base, in determining that the respondent's prime overruns were sold in the ordinary course of trade. Thus, Nucor avers, the record in this review is clearly distinguishable, because Hyundai Steel's overrun sales are of a lesser quality, represent a negligible total volume of Hyundai Steel's sales, were more likely to be sales of non-prime merchandise, and were made to substantially fewer customers, in lesser quantities, at significantly lower prices.

Nucor argues that the Department should continue to find that Hyundai Steel's sales of overrun merchandise were of comparatively low volume and to a small number of customers. Nucor contends that Hyundai Steel provides no legal support for its assertion that the second factor in the Department's analysis should be properly understood to mean that sales should be disregarded where the ratio is aberrationally so small as to signify that overrun sales are uncommon. Nucor further claims that Hyundai Steel provides no legal support for its assertion that an examination of the ratio in these circumstances should be limited to see whether a given ratio is historically aberrational vis-à-vis other time periods. Citing *Welded Carbon Steel Pipe from Turkey*, Nucor alleges that the Department has found overruns to be outside the ordinary course of trade even when the comparative volume of overrun sales is significant. Nucor also

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<sup>65</sup> See *Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 81 FR 92785 (December 20, 2016) (*Welded Carbon Steel Pipe from Turkey*), and accompanying Issues and Decision Memorandum at Comment 3.

<sup>66</sup> See *NOES from Korea* and accompanying Issues and Decision Memorandum at Comment 2.

asserts that the facts of this review are distinguishable from *Hot-Rolled from India*.

Nucor argues that the Department should continue to find that the average quantity of Hyundai Steel's sales of overrun merchandise is smaller than the average quantity of its sales of non-overrun merchandise. Nucor contends that Hyundai Steel's arguments regarding the Department's analysis of the average quantity of overrun and non-overrun products are meritless and lack legal support. Nucor asserts that it is the Department's established practice to compare the average quantity of overrun sales to the average quantity of non-overrun sales as a factor in determining whether overrun sales are within the ordinary course of trade. Citing *Welded Carbon Steel Pipe from Turkey*, Nucor alleges that, where the Department has found the average quantity of overrun sales to be significantly lower on a percentage basis than the average quantity of non-overrun sales, as here, that factor supports a finding that overrun sales are outside the ordinary course of trade.

Finally, Nucor argues that the Department should continue to find that Hyundai Steel sold overrun merchandise at a much lower price than its non-overrun merchandise. Nucor contends that, although Hyundai Steel argued that the Department's analysis was contrary to law, the respondent failed to cite any case law supporting its position. According to Nucor, the Department's methodology is consistent with the Department's longstanding practice and has been upheld by the CIT in *Mantex*.<sup>67</sup> Nucor contrasts this case with *Hot-Rolled from India* where the Department analyzed relative profit levels on overrun and non-overrun sales and found that the profit and net unit sales price were similar.

**Department's Position:** We continue to find that Hyundai Steel's overrun sales were outside the ordinary course of trade. Section 773(a)(1)(B)(i) of the Act states, in part, that NV is "the price at which the foreign like product is first sold (or, in absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade...." The term "ordinary course of trade" is defined as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind."<sup>68</sup> The SAA clarifies this portion of the statute when it states, "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market."<sup>69</sup> Thus, the statute and the SAA are clear that a determination of whether sales (other than those specifically addressed in section 771(15) of the Act, *i.e.*, below-cost sales and sales between affiliates that are not at market prices) are in the ordinary course of trade must be based on an analysis comparing the sales in question with sales of merchandise of the same class or kind generally made in the home market. In other words, the Department must consider whether home-market sales of overrun CTL plate are sales in the ordinary course of trade in comparison with other home-market sales of CTL plate.

The purpose of determining whether certain sales are outside of the ordinary course of trade "is

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<sup>67</sup> See *Mantex Inc. v. United States*, 841 F. Supp. 1290 (CIT 1993) (*Mantex*).

<sup>68</sup> See section 771(15) of the Act.

<sup>69</sup> See SAA at 834.

to prevent dumping margins from being based on sales which are not representative” of the home market.<sup>70</sup> By basing the determination of NV upon representative sales, the provision ensures an appropriate comparison between NV and sales to the United States. Congress has not specified any criteria that the agency should use in determining the appropriate “conditions and practices.” Thus, the Department, “in its discretion, chooses how best to analyze the many factors involved in a determination of whether sales are made within the ordinary course of trade.”<sup>71</sup>

In evaluating whether sales of overrun merchandise are outside the ordinary course of trade, the Department has considered several factors in past cases. These non-dispositive factors include, but are not limited to, the following:

- 1) whether the merchandise is “off-quality” or produced according to unusual specifications;
- 2) the comparative volume of sales and the number of buyers in the home market;
- 3) the average quantity of the overrun and commercial sales;
- 4) the price and profit differentials in the home market.<sup>72</sup>

In this review, Hyundai Steel reported that its overrun sales occur “when products are not accepted by the original customer, whether due to excess production volumes or quality issues, and sold to another customer.”<sup>73</sup>

For the preliminary results, we found that 1) Hyundai Steel’s sales of overrun merchandise are much more likely to be sales of non-prime merchandise than are its non-overrun sales, 2) Hyundai Steel’s sales of overrun merchandise were of comparatively low volume and were made to a small number of customers, 3) the average quantity of Hyundai Steel’s sales of overrun merchandise is smaller than the average quantity of its sales of non-overrun merchandise, and 4) the prices and profit levels between overrun and non-overrun sales in the home market were dissimilar.<sup>74</sup> As a result of this analysis, we determined that Hyundai Steel’s overrun sales were not made in the ordinary course of trade.

Hyundai Steel mischaracterizes our analysis and what is required to find a subset of sales to be outside the ordinary course of trade. First, we do not evaluate ordinary course of trade allegations on a sale-by-sale basis. Thus, it does not matter that some overruns were designated as prime merchandise. As described above, Hyundai Steel’s overrun sales are designated as such because they have been rejected by the original customer and sold elsewhere. It is this fact which distinguishes Hyundai Steel’s overrun sales from other foreign like product and, as

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<sup>70</sup> See *Monsanto Co. v. United States*, 698 F. Supp. 275, 278 (CIT 1988).

<sup>71</sup> See *Laclede Steel Co. v. United States*, 19 CIT 1076, 1078 (1995).

<sup>72</sup> See *China Steel Corp. v. United States*, 264 F. Supp. 2d. 1339, 1364-65 (CIT 2003). See also *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review*, 70 FR 67428, 67430 (November 7, 2005), unchanged in *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 71 FR 13080 (March 14, 2006).

<sup>73</sup> See Letter from Hyundai Steel, “Certain Cut-To-Length Carbon-Quality Steel Plate from Korea: Hyundai Steel Sections B-D Questionnaire Response,” dated June 27, 2016 at B-11.

<sup>74</sup> See Memorandum, “Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Hyundai Steel Company’s Home Market Overruns,” dated February 27, 2017 (Overrun Memo).

described above, we found that overrun sales are much more likely to be sales of non-prime merchandise than are Hyundai Steel's non-overrun sales. Accordingly, this factor supports the conclusion that Hyundai Steel's overrun sales are not representative of the home market and are outside the ordinary course of trade.

With respect to *Hot-Rolled from India*, the Issues and Decision Memorandum does not explain why the Department chose to distinguish between prime and non-prime overrun sales in that case. However, as Nucor suggests, it appears that the totality of circumstances, which included the quantity of individual sales, the profit and new unit sales price, and the lack of concentrated customer base, were similar for the respondent's prime overrun and non-overrun sales. In this case, we have tested Hyundai Steel's prime overrun sales in isolation using the same analysis we used in testing all of Hyundai Steel's overrun sales for the preliminary results (*i.e.*, we removed non-prime sales from the analysis) and found similar results as we found for all of Hyundai Steel's overrun sales for the preliminary results.<sup>75</sup> That is, when examining Hyundai Steel's prime sales in isolation, we find that a) Hyundai Steel's sales of overrun merchandise were of comparatively low volume and were made to a small number of customers, b) the average quantity of Hyundai Steel's sales of overrun merchandise is smaller than the average quantity of its sales of non-overrun merchandise, and c) the prices and profit levels between overrun and non-overrun sales in the home market were dissimilar.<sup>76</sup> As a result, we determine that this review is distinguishable from *Hot-Rolled from India*.

Second, we found that Hyundai Steel's sales of overrun merchandise were of comparatively low volume and were made to a small number of customers, and this was one element (not dispositive in and of itself) that factored into our determination. It is not our practice to determine that the sales volumes of number of customers be "aberrationally" low in order to find the overrun sales to be outside the ordinary course of trade, nor is there any precedent we are aware of which suggests this. Certainly, as Nucor observes, Hyundai Steel cited no precedent with respect to this point. In any event, it is not our view that this factor alone is dispositive in determining whether overrun sales are outside the ordinary course of trade. Rather, it is this factor in conjunction with the other three factors that led to our conclusions. Given that Hyundai Steel's sales of overrun merchandise were of comparatively low volume and were made to a small number of customers, this factor supports the conclusion that Hyundai Steel's overrun sales are not representative of the home market and are outside the ordinary course of trade.

Third, it is not our practice to expect a "one-to-one result" when comparing the average of the quantities of overrun sale to non-overrun sales. Here, the average quantity of overrun sales is significantly smaller than the average quantity of non-overrun sales.<sup>77</sup> This factor supports the conclusion that Hyundai Steel's overrun sales are not representative of the home market and are outside the ordinary course of trade.

Finally, with respect to the price and profit differentials in the home market, we continue to find

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<sup>75</sup> See Hyundai Steel Final Analysis Memo.

<sup>76</sup> *Id.* Of course, when looking at prime products in isolation, we will necessarily be able to reach no conclusion as to whether sales of overrun merchandise are more likely to be sales of non-prime merchandise than are non-overrun sales.

<sup>77</sup> See Overrun Memo at 3.

that this factor supports the conclusion that Hyundai Steel's overrun sales are not representative of the home market and are outside the ordinary course of trade.

Hyundai Steel claims that the fact that it sold overrun merchandise in the home market at a much lower price than the price at which it sold non-overrun merchandise does not mean that its overrun sales are outside the ordinary course of trade. If this were the only factor distinguishing overrun and non-overrun sales in the home market, we might agree.

However, as described above, we have examined collectively all four of the individual non-dispositive factors we normally examine point to the conclusion that Hyundai Steel's overrun sales are not representative of the home market and are outside the ordinary course of trade. The sales in question are of an inferior quality, represent a small volume of Hyundai Steel's total home market sales, were more likely to be sales of non-prime merchandise, and were made to fewer customers, in smaller quantities, and at lower prices than Hyundai Steel's other home market sales. Accordingly, we have not adjusted our treatment of Hyundai Steel's overrun sales in these final results.

#### **Comment 7: Marine Insurance**

Hyundai Steel argues that it demonstrated the arm's-length nature of marine insurance service provided by an affiliated party. Hyundai Steel claims that it has provided ample evidence on the record to allow the Department to find that Hyundai Steel's transactions with its affiliated marine insurance provider were at arm's length: the record confirms that the affiliate operated at a profit during the period. Consequently, Hyundai Steel avers, there is no need for the Department to apply any adjustment to Hyundai Steel's reported marine insurance expenses.

Hyundai Steel further argues that, if the Department continues to find that an adjustment for marine insurance expenses is warranted, the Department should use a different benchmark for any adjustment. According to Hyundai Steel, the benchmark used by the Department in the *Preliminary Results* was based on marine insurance rates paid by Hyundai Steel's U.S. affiliate to an unaffiliated service provider. Hyundai Steel claims that these are not comparable because of differences between Hyundai Steel and its U.S. affiliate in their respective sales volumes and proportion of sales for which insurance claims are filed. Hyundai Steel submits that, to the extent an adjustment is necessary, a better benchmark would be the marine insurance rate that Hyundai Steel paid to an unaffiliated service provider to insure its hot-rolled steel coil shipments to the United States. Hyundai Steel asserts that these rates reflect comparable transactions, with both sets of transactions having Hyundai Steel as the insurance policy holder, the same market, the same period, and for comparable shipments. Alternatively, Hyundai Steel contends, the Department could use the rates the affiliated insurer charged to unaffiliated steel customers for comparable shipments.

Nucor argues that the Department properly found that Hyundai Steel's affiliated marine insurance purchases were not made at arm's length. Nucor contends that the fact that the affiliate's financial statement indicates that it had profits does not demonstrate that the rates between it and Hyundai are at arm's length. Nucor observes that Hyundai Steel is not the affiliate's only customer, and alleges that the affiliate could offset the losses from selling

Hyundai Steel below market insurance by charging higher prices to other unaffiliated companies.

Nucor argues that the marine insurance rates paid by Hyundai Steel's U.S. affiliate to an unaffiliated service provider are the best benchmark because it reflects rates for actual CTL plate shipments. Nucor asserts that Hyundai Steel provided no quantitative analysis to support its claim that these rates are not comparable because of differences between Hyundai Steel and its U.S. affiliate in their respective sales volumes and proportion of sales for which insurance claims are filed. Nucor contends that there is no better benchmark than the rates paid by a company's affiliate to an unaffiliated provider for the same product moving along the identical shipping routes.

**Department's Position:** The benchmark we used for the preliminary results was for shipments of subject merchandise to the United States.<sup>78</sup> The alternative benchmarks suggested by Hyundai Steel were for shipments of non-subject merchandise to the United States.<sup>79</sup> We determine the benchmark we used for the preliminary results is the most appropriate benchmark of those available to us because it covers the merchandise subject to this review.

Hyundai Steel asserts that the rates paid by the U.S. affiliate are not comparable because of differences between Hyundai Steel and its U.S. affiliate in their respective sales volumes and proportion of sales for which insurance claims are filed by U.S. customers relative to Korean customers. However, there is no evidence on the record to support Hyundai Steel's assertions. Accordingly, for these final results, we have continued to use the same benchmark we used in the preliminary results.

#### **Comment 8: Reviewable Entries**

Samsung requests that, consistent with the Department's determination of no shipments in the last completed review, the Department find that Samsung C&T Engineering & Construction Group and Samsung C&T Trading and Investment Group had no reviewable entries during the POR. Samsung argues that it would be confusing and illogical to assign dumping margins to these two companies when the Department has preliminarily determined that Samsung had no reviewable entries. Samsung claims that, because Nucor's review request identified these three companies together with a single address and a single service copy to all three companies, Nucor's own review request can be interpreted as applying to Samsung as a single entity. Samsung explains that the Department's initiation of this review with respect to these three companies should be considered as a single initiation and the Department's determination of no shipments for Samsung should be extended to the other two Samsung companies.

Samsung requests that, if the Department declines to consider Samsung C&T Engineering & Construction Group and Samsung C&T Trading and Investment Group as covered by Samsung's no-shipment claim, given the similarity in the names of these three companies, the Department should ensure that the new 10-digit AD/CVD case numbers associated with Samsung C&T

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<sup>78</sup> See Letter from Hyundai Steel, "Certain Cut-To-Length Carbon-Quality Steel Plate from Korea: Hyundai Steel Second Supplemental Sections A-D Questionnaire Response," dated November 2, 2016 at Exhibit SS-11.

<sup>79</sup> See Letter from Hyundai Steel, "Certain Cut-To-Length Carbon-Quality Steel Plate from Korea: Hyundai Steel Supplemental Sections A-D Questionnaire Response," dated September 13, 2016 at Exhibit S-27-B.

Engineering & Construction Group and Samsung C&T Trading and Investment Group do not apply to entries made by Samsung. Samsung claims that, absent such express clarification, there could be confusion with respect to any future entries made by Samsung. Samsung also requests that the Department include clarification notes in the company notes maintained in the ACE entry system of Customs and Border Protection (CBP) for Samsung C&T Engineering & Construction Group and Samsung C&T Trading and Investment Group confirming that the case numbers do not apply to Samsung.

Nucor argues that, although Samsung C&T Engineering & Construction Group and Samsung C&T Trading and Investment Group were named as respondents in the *Initiation Notice*, neither of them claimed no shipments within the established deadline, *i.e.*, 30 days after the publication of the *Initiation Notice*. Nucor claims that the Department properly included them in this administrative review.

**Department's Position:** For the final results of this review, we cannot determine, based on record evidence, that Samsung C&T Engineering & Construction Group and Samsung C&T Trading and Investment Group made no shipments of subject merchandise to the United States. The deadline for the submission of no-shipment claims was Monday, May 9, 2016,<sup>80</sup> and neither Samsung C&T Engineering & Construction Group nor Samsung C&T Trading and Investment Group filed no-shipment letters or any other documentation demonstrating good reason to support their claims that these companies made no entries of subject merchandise during the period of review. For the final results, we continue to assign the rate for non-selected respondents to Samsung C&T Engineering & Construction Group and Samsung C&T Trading and Investment Group. In CBP's ACE entry system, we will insert notes explaining that the rates applicable to Samsung C&T Engineering & Construction Group and Samsung C&T Trading and Investment Group do not apply to Samsung.

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<sup>80</sup> See *Initiation Notice*, 81 FR at 20324 (“If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (‘POR’), it must notify the Department within 30 days of publication of this notice in the *Federal Register*.”) The 30<sup>th</sup> day after the publication of the *Initiation Notice* was Saturday, May 7, 2016. The next business day was Monday, May 9, 2016. See 19 CFR 351.303(b)(1) (“For both electronically filed and manually filed documents, if the applicable due date falls on a non-business day, the Secretary will accept documents that are filed on the next business day.”)



## Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results of this review and the final dumping margins for all the reviewed companies in the *Federal Register*.



Agree



Disagree

8/30/2017

X



Signed by: GARY TAVERMAN

Gary Taverman

Deputy Assistant Secretary

for Antidumping and Countervailing Duty Operations,  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance